In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No. 1511 145

TITLE INSURANCE AND GUARANTY COMPANY, ELIZABETH HUMPHREY, HARRY LEE JONES, JULIAN M. EDWARDS and MARJORIE B. EDWARDS,
Petitioners (Appellants below,)
vs.
JAMES P. HART, Trustee of Mount Gaines Mining Company, Debtor,
Respondent (Appellee below.)

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

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for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

The above named petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause (R. 1449-1450), affirming the judgment of the District Court of the United States for the District of Nevada. (R. 136-140.)

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals and dissenting opinion (R. 1409-1449) are reported in *Title Insurance and Guaranty Co. v. Hart,* 9 Cir. 160 Fed. (2d) 961.

The opinion of the District Court (R. 136-140) is not reported.

JURISDICTION.

Final judgment in the District Court in said cause was entered October 30, 1945, in favor of James P. Hart, as trustee, petitioner. (R. 136-140.)

On November 29, 1945, petitioners (respondents in the trial Court) appealed to the Circuit Court of Appeals for the Ninth Circuit from the judgment of the District Court. (R. 146.)

On January 8, 1947, the Circuit Court of Appeals for the Ninth Circuit affirmed the said judgment of the District Court. (R. 1449-1450.)

A timely petition for rehearing was denied on March 24, 1947. (R. 1450.) Order directing amendment of opinion of the Circuit Court of Appeals and a substitution of a new dissenting opinion was filed March 24, 1947. (R. 1450-1451.) An order was made on March 27, 1947, by said Circuit Court of Appeals staying the issuance of the writ of mandate to May 1, 1947. On April 24, 1947, an order was made by said Circuit Court of Appeals further staying the issuance of the writ of mandate to and including June 1, 1947, and on May 29, 1947, an order was made by said Circuit Court of Appeals further staying the issuance of the writ of mandate to and including June 24, 1947.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Sec. 1, 43 Stat. 938, 28 U. S. C. A., Sec. 347(a); and under Section 24(c) of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 553; as amended by the Act of June 22, 1938, c. 575, Sec. 1, 52 Stat. 854; 11 U. S. C. A. Supp. Sec. 47(c).

QUESTIONS PRESENTED.

In a controversy in a Chapter X reorganization proceeding in bankruptcy as to whether or not the trustee had exercised an option in a mining lease for

its renewal, which renewed lease would be a ten year extension of the original lease, the following questions are involved:

(1) Does the provision in Section 70b of the Bankruptcy Act that:

> "Within sixty days after the adjudication, the trustee shall assume or reject * * * unexpired leases of real property: Provided, however, that the Court may for cause shown extend or reduce such period of time, any such * * * lease not assumed or rejected within such time, whether or not a trustee has been appointed or has qualified shall be deemed to be rejected."

apply to Chapter X reorganization proceedings in bankruptcy?

(2) Is the lease dated December 16, 1933, referred to in this action to be deemed rejected in the absence of any allegation or proof that the trustee assumed it in conformity with the said provision of Section 70b of the Bankruptcy Act?

(3) Is the lease referred to in this action to be deemed assumed whether or not the said provision of Section 70b of the Bankruptcy Act applies to Chapter X reorganization proceedings in bankruptcy, where it does not appear from the record that the trustee obtained from the District Court an order authorizing him to assume the lease *cum onere,* or that thereafter he filed in the proceedings his written declaration that he assumed the lease?

(4) Should the Federal Courts in this action give effect to the State local law governing the substantive

rights of the lessors and lessees in respect to the following:

(a) The provision in the lease that: "Time is the essence of this agreement"?

(b) The respective rights of the offerer and offeree in an option in the lease for a renewal or extension of the lease?

(c) Whether or not the Court can relieve the offeree in an option in a lease for a renewal or extension of such lease from the effect of a termination of such option by reason of his failure to comply with the conditions precedent thereof?

STATUTES INVOLVED.

Section 70b of the Bankruptcy Act (11 U. S. C. A. Sec. 110b) (see page 17.)

California Civil Code Section 1436 (see page 26);

California Civil Code Section 1439 (see page 26);

California Civil Code Section 1492 (see page 31);

California Civil Code Section 1587 (Sub. 3) (see page 27);

California Civil Code Section 3275 (see page 31).

STATEMENT OF THE CASE.

On December 1, 1934, Mount Gaines Mining Company, a Nevada corporation, succeeded to all the rights of the lessees in a mining lease executed in the State of California by residents of California, dated December 15, 1933, on the Mount Gaines Mine situated in Mariposa County, California. (R. 27.)

The lease, *inter alia*, contained the following provisions:

> "That all operations of said Lessees shall be in accordance with the laws and mine and milling regulations of the state of California." (R. p. 39.)
>
> "That Lessees shall pay as a royalty to the owner ten per cent (10%) of all production of and from said mine, from the gross returns of ores shipped and sold, the returns from all recovery of ores milled, concentrates, amalgams, mint returns or bullion." (R. p. 39.)
>
> "That all payments shall be made * * * not later than the 25th day of following calendar month." (R. p. 39.)
>
> "That the Lessees * * * shall keep complete records of operations, accounts, mining maps and production, to be open to full inspection of the owner at any time." (R. pp. 40-41.)
>
> "That should the Lessees fail to keep any of the covenants herein provided, or to carry out any of said covenants contained, then the owner shall be released therefrom and enter forthwith into possession of said mine and all property thereon." (R. p. 41.)
>
> "* * * that any failure of the owner to insist upon a strict compliance of the terms of this

agreement by the Lessees shall not constitute or be deemed a waiver of the right of the owner to insist upon such compliance." (R. p. 41.)

"Time is the essence of this agreement." (R. p. 43.)

The lease also contained the following option:

"In consideration of, and the faithful compliance thereto by said lessees of the foregoing agreement and covenants therein, the said owner agrees that upon written application of the lessees to grant unto said lessees a further lease upon said mine, its improvements and acquisitions, and extension of this lease for a further term of ten years under the same covenants, royalties and rights." (R. pp. 41-42.)

On June 29, 1939, Mount Gaines Mining Company petitioned the United States District Court for the District of Nevada that it be adjudged a debtor in a Chapter X reorganization proceeding in bankruptcy. (R. 2-15.)

The District Court granted the petition on June 29, 1939, and in its order directed the debtor to continue temporarily in possession of the Mount Gaines Mine under the terms of the said lease and to operate the mine and pay royalties from net proceeds. (R. 16-20.) On August 11, 1939, James P. Hart was appointed trustee and the debtor in possession was ordered to turn over its assets to the trustee. (R. 25.)

On December 2, 1943, the District Court upon petition by Hart, as trustee, ordered him to make demand for the extension of the agreement of lease with

option to purchase "*now owned by Mount Gaines Mining Company* for the said Mount Gaines Mine." (R. 970-972.)

On December 3, 1943, Hart as trustee made application to lessors for a further lease which would be a ten year extension of the lease mentioned and would contain an option to purchase an undivided ¾ths interest in the leased premises in all respects as was set forth in the original lease. (R. 52-54.) Hart's request was refused. (R. 55-56.)

On September 9, 1944, Hart as trustee filed in the District Court a petition which became the basis of the judgment below. (R. 26-35.) This petition was for an order directing the owners of the leased Mount Gaines Mine to show cause why they had "failed, refused and neglected to give and grant unto trustee an extension of the lease and option to purchase."

Hart's petition, inter alia, alleged that Mount Gaines Mining Company, the debtor, since December 1, 1934, "has been and now is in the sole and exclusive possession of all said mining claims, operating said mines and mining claims in accordance with the agreements and covenants contained in said lease with option to purchase, and has complied with all of the terms and conditions contained therein and has duly performed all conditions on its part" (R. 28-29); that the refusal of lessors to grant a renewal lease "has cast a cloud upon the right and title of the *Mount Gaines Mining Company* to hold, operate and to sell and dispose of ores mined on said Mount Gaines Mine * * *" (R. 35.) The prayer in Hart's

petition was: "That the written application for an extension of said agreement of lease and option, * * * had the effect and did, extend the said lease and option dated December 16, 1943, to December 16, 1953, to your petitioner and to the said *Mount Gaines Mining Company* * * *" (R. 36), and that lessors "* * * be restrained and enjoined from in any manner interfering with the rights of the *Mount Gaines Mining Company* and your petitioner in the protection and securing the rights of said debtor corporation, *Mount Gaines Mining Company.*" (R. 37.) (Italics supplied.)

There was no allegation in Hart's petition that he, as trustee had ever *assumed* the lease and there was no allegation therein that Hart as trustee ever acquired any right, title or interest in said lease and options therein. Mount Gaines Mining Company, the debtor, was not a party to said controversy.

The petitioners herein, respondents in the lower Court, denied all of the material allegations of Hart's petition and affirmatively alleged specific instances in which lessee had failed to faithfully comply with the terms of the lease (R. 63-74, 79-82, 86-91, 104, 111); also affirmatively alleged that Hart as trustee had not at any time assumed the lease pursuant to provisions of Section 70b of the Bankruptcy Act or otherwise or at all and "* * * that said * * * Hart * * * did not on December 3, 1943, or at any time have any authority or right or power under or pursuant to said lease or otherwise to make application for or demand or receive any further lease of said mine or

any renewal or extension thereof" (R. 86) and that Hart's application to lessors for a further lease did not constitute an authoritative or legal application for a further lease upon said mine. (R. 86.)

The trial was by the Court. Evidence was introduced on the trial, without objection, as to numerous failures of the lessee to faithfully comply with the agreements, covenants and conditions of the lease and option for a further lease. There was no evidence to the contrary. The greater part of the testimony as to failures of the lessee to pay current royalties on or before the 25th day of the month next following the month in which the mint or smelter returns were received by the lessee was given by Wilbur E. Thain, on cross-examination. Thain was a public accountant and witness for trustee Hart.

Following is a partial list of the breaches by the lessee:

(1) Mount Gaines as lessee failed "to keep complete records of operations, accounts and production" to the extent that it was impossible for the certified public accountant employed by the trustee in bankruptcy to audit the books of Mount Gaines Mining Company, to determine from its books, accounts and records from the beginning of its mining operations in December, 1934, under the lease down to April, 1938, what was its "production" or "returns" from each lot of bullion or concentrates shipped by it to the mint or smelter, or when it received its returns from each such lot or its "royalty liability" on each such return. (R. 924, 925, 1266, 1267, 1348.) Addi-

tional failures to keep complete records. (R. 341, 354, 393, 906, 912, 913, 1263, 1264, 1265.)

(2) Following is a list of specific failures of Mount Gaines as lessee to pay at all or in full royalties payable pursuant to said lease not later than the 25th day of the month following the month in which the lessee received the mint or smelter returns:

$1358.70 underpayment in royalties due May 9, 1938, of which a part remained unpaid until October, 1938. (R. 1053.)

$773.52, net underpayment of royalties on August 11, 1939, as testified by Thain. (R. 1255.)

During Thain's cross-examination, Mr. Tucker, attorney for the Securities & Exchange Commission, propounded the following question:

> Mr. Tucker. And from what period does that underpayment stem?
>
> Mr. Thain answered: "Well, it stems of course, right from the beginning of operations in 1934. As indicated, the underpayment occurred in the first two periods, the Ilseng, and the Humphrey period."
>
> Q. "That is the period prior to May 9, 1938, yes." (R. 1256.)

$1857.66 "delinquency" in royalties on May 9, 1938, as testified to by Thain. (R. 1373.)

$1280.52 in royalties due on smelter returns which royalties became delinquent on June 26, 1938. A check for this $1280.52, with letter of transmittal was mailed by State Trustee Trask from La Jolla, California, to C. P. T. & T. Co., San Francisco on June 27, 1938. Date of delivery by letter unknown.

The letter of transmittal (R. 561) states:

> "* * * we have been unable to arrange to have this check reach your office on the 25th.
>
> "Royalty for March was already in arrears when the trustees took over control.
>
> "For the month of April production at the mine was barely sufficient to meet running expenses and certain other emergency and absolutely necessary heavy expenditures in the first half of May. The trustees were therefore compelled to let the April royalty go by default. It is now hoped that the earnings are improving sufficiently to make possible the gradual clearing off of the arrears * * *." (R. 561-562.)

$561.45 default in royalties payable in January, 1936. Check dated May 2, 1936, issued for these royalties on May 2, 1936. (Ilseng's testimony.) (R. 800-801.)

$613.61 default in royalties payable in February, 1936. Check postdated May 9, 1936, issued for these royalties on May 2, 1936. (Ilseng's testimony.) (R. 800-801.)

$413.68 default in royalties payable in March 1936. Check postdated May 15, 1936, issued for these royalties on May 2, 1936. (Ilseng's testimony.) (R. 800-801.)

$1358.70 underpayment in royalties during the second period of operations of Mount Gaines by Mount Gaines from 10/8/37 to 5/9/38 or a total underpay-

ment of royalties during said two periods of $1857.66, according to Hart's testimony. (R. 1053.)

(3) There was also evidence of forty-three (43) violations by lessee of the mine safety orders of the California Industrial Accident Commission, twenty-one (21) of which are detailed in the dissenting opinion of Judge Denman of the Circuit Court of Appeals for the Ninth Circuit herein. (R. 1440-1444.)

As both the majority and dissenting opinions in the Circuit Court of Appeals below concede that many violations of the lease occurred we refrain from detailing more of them.

Final judgment in the District Court in said cause was entered October 30, 1945, in favor of James P. Hart as trustee, petitioner. (R. 136-140.)

On November 29, 1945, petitioners herein (respondents in the trial Court) appealed to the Circuit Court of Appeals for the Ninth Circuit from the judgment of the District Court. (R. 146.)

On January 8, 1947, the Circuit Court of Appeals affirmed the said judgment of the District Court. (R. 1449-1450.) On February 7, 1947, petitioners herein (appellants) filed their petition for a rehearing by the Circuit Court of Appeals which petition was denied on March 24, 1947, on which date the Circuit Court of Appeals filed its opinion of January 8, 1947, as amended March 24, 1947. (R. 1450-1451.) A dissenting opinion was filed by Denman, Circuit Court of Appeals judge. (R. 1434-1449.)

GROUNDS OF DECISION OF CIRCUIT COURT OF APPEALS.

The decision of the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court on the following grounds:

(1) The trustee in the Chapter X reorganization proceeding will be deemed to have *assumed* the mining lease which was an asset of the debtor as lessee, notwithstanding "no writing was found which expressly so provided" from the fact that the trustee took possession of and operated the leased premises as a mine and paid royalties called for by the lease to lessors as directed by the Court". (R. 1413-1416.)

> "(2) Lessors by reason of their recognition of the operation of the mine by Hart as the trustee and the acceptance of the benefits resulting from such operation are in no position to question his assumption of the lease." (R. 1416.)
>
> "(3) The assumption, rejection and automatic rejection provisions of Sec. 70b are inconsistent with and inapplicable to Chapter X reorganization proceedings." (R. 1418.)
>
> "(4) The trial court was correct in holding appellee's application extended the lease for an additional term of ten years on the same terms as the original lease." (R. 1421.)
>
> "(5) Under the terms of the lease faithful performance is the requirement. * * * But a readiness on the part of the lessees to comply when violations were called to their attention is evidenced by the fact that before the Industrial Accident Commission was required to take steps which might have slowed production or otherwise injured lessor, all violations were corrected." (R. 1431.)

(6) In the event the option for a renewal lease had terminated because of the failure of the lessee to faithfully comply with the conditions precedent in the option, the trustee would thereby incur "a loss in the nature of a forfeiture" in which event the trial court would have the power under California Civil Code Sec. 3275, to relieve the trustee from such loss

> "upon *making full compensation* * * * except in case of a grossly negligent, wilful or fraudulent breach of duty * * *. The lower court found, and we think correctly, that there was no "grossly negligent, wilful, or fraudulent breach of duty * * * full compensation has been made to the lessor in the sense that all of the deficiencies have been made up * * *". (R. 1433.)

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding that "the assumption, rejection and automatic rejection provision of Sec. 70b (of the Bankruptcy Act) are inconsistent with and inapplicable to Chapter X reorganization proceedings." (R. 1416.)

2. In holding that the operation of the leased premises by the trustee and the payment by the trustee of royalties called for by the lease "clearly demonstrated that he (the trustee) did" assume the lease notwithstanding "no writing is found which expressly so provides." (R. 1413.)

3. In holding that the lessors by reason of their recognition of the operation of the leased premises by

the trustee and the acceptance of the benefits resulting from such operation are estopped to raise the question that the trustee had never assumed the lease in question and never acquired any title or rights under it. (R. 1416.)

(4) In holding in effect that the trial Court was not bound to give any force or effect to the provision in the lease that "time is the essence of this agreement" for the reason that: "the trial Court found no deviation from faithful performance of the lease because of any gross, negligent, wilful, or fraudulent breach of duty" and the owners were not damaged by reason of any failure of the lessee or trustee to faithfully comply with the agreement and provisions of the lease. (R. 1431.)

(5) In holding "* * * we think that he (trustee) has sufficiently complied with the conditions precedent in the option for a renewal lease." (R. 1432.)

(6) In holding that the trial Court under California Civil Code Section 3275 could relieve the lessee from a "loss in the nature of a forfeiture" resulting from the termination of the option for a renewal lease by reason of the breach by lessee of the conditions precedent in the lease and option, there having been "no grossly, negligent, wilful or fraudulent breach of duty" by the lessee. (R. 1432.)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

A.

The decision of the Circuit Court of Appeals that "* * * we hold that the assumption, rejection and automatic rejection provisions of Sec. 70b are inconsistent with and inapplicable to Chapter X reorganization proceedings." (R. 1418.)

is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit on the same matter in the case of *Wiemeyer v. Koch,* 8 Cir. 152 F. 2d 230. In the *Wiemeyer* case, the Court held (8 Cir. 152 F. 230-234):

> "Section 70, sub. (b) of the Bankruptcy Act as amended June 22, 1938, C. 572, Sec. 1, 52 Stat. 879, 11 U. S. C. A. Sec. 110, sub. (b), provides in part as follows:
>
> 'Within sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property: *Provided, however,* That the Court may for cause shown extend or reduce such period of time. Any such contract or lease not assumed or rejected within such time, whether or not a trustee has been appointed or has qualified, shall be deemed to be rejected'.
>
> "Under reorganization proceedings the rights of a lessor and of a debtor relative to a lease are substantially the same as those prevailing in equity receiverships. (Finn v. Meighan, 325 U. S. 300, 65 S. Ct. 1147; In re Walker, 2 Cir. 93 F. (2d) 281 * * * "
>
> "Here there was no formal adoption of this lease either within sixty days limited by the

statute nor at any subsequent time. The court, however, from time to time ordered payment of rent as provided in the lease and the payments made by the trustee were all at the rate so provided. It is insisted that this was tantamount to an adoption of the lease but the lease was certainly not assumed within sixty days from the adjudication and it was therefore deemed to be rejected. The statutory presumption of rejection by nonaction within the period of sixty days is a conclusive statutory presumption. (Collier on Bankruptcy, 14 Ed. Sec. 70.43, p. 1230). The period might have been extended for cause shown but it was not so extended."

B.

The decision of the Circuit Court of Appeals to the effect that Hart as trustee in a Chapter X reorganization proceeding could and did assume the mining lease *cum onere,* merely by operating the leased premises and paying the lessors money in amounts equal to cash royalties payable currently pursuant to the lease but (1), without applying to the District Court for, and (2), without obtaining from it an order authorizing him to assume the lease, and (3), without any formal declaration by him that he assumed the lease, is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit on the same matter in the case of *In re Walker,* 93 F. (2d) 281; also in conflict with the decision of the Circuit Court of Appeals for the Eighth District on the same matter in the case of *Wiemeyer v. Koch,* 8 Cir. 152 F. (2d) 230.

In the *Walker* case, the Court held (2 Cir. 93 F. (2d) 281):

> "Nor can we see that the situation changes where there is no receiver, but a debtor is continued in possession under subdivision (c) (11) of Section 77(B) 11 U. S. C. A. sec. 207 (c) (11). Such debtor does not pay as lessee; it may not do so, it is forbidden to affirm a lease without order of the court, and the payment of rent as rent would be as much an affirmance, if lawful, as is the lessor's acceptance. Its position as debtor, 'continued in possession', is for all purposes that of a trustee or receiver, as we have said."

In the *Wiemeyer* case the Court held (8 Cir. 152 F. (2d) 230-234):

> "Payment of rent upon the property of the trustee is not to be taken as rent in the sense of money due under the lease, but as payment for the use and occupation of the property so that the payment of compensation does not of necessity recognize the continued existence of the lease. In re Walker, supra; Moore v. Risley, 9 Cir. 287 F. 10; Model Dairy Co. v. Foltis-Fischer, 2 Cir. 67 F. (2d) 704.
>
> "Here there was no formal adoption of the lease either within the sixty days limited by the statute nor at any subsequent time. The court, however, from time to time ordered payment of the rent as provided in the lease and the payments made by the trustee were all at the rate so provided. It is insisted that this was tantamount to an adoption of the lease but the lease was certainly not assumed within sixty days from the

adjudication and it was therefore deemed to be rejected. The statutory presumption of rejection by nonaction within the period of sixty days is a conclusive statutory presumption. (Collier on Bankruptcy, 14 Ed. Sec. 70.43, p. 1230. * * *"

"There was however, an obligation to pay the reasonable value of the use and the payments made pursuant to order of court must, we think, be held to be payments not under the lease, but as the reasonable value of the use of the premises."

* * * * * * *

"Neither the various petitions filed by the lessors nor the various petitions filed by the trustee asking for instructions as to the payment of delinquent rent revealed to the court a proposal to assume the lease in its entirety, and it cannot be said from the record that the trial judge knew or even suspected that he was being called upon to approve or adopt the entire contract."

The allegations by trustee Hart in his petition filed in the District Court on November 24, 1943: "That the said lease and option to purchase are the sole assets of the *Mount Gaines Mining Company* * * *" (R. 969); the order of the District Court based on Hart's said petition made and entered December 2, 1943, that Hart should "immediately file his written application and make a demand for an extension of the agreement of lease with option to purchase now owned by the *Mount Gaines Mining Company*" (R. 972); and Hart's allegations in his petition filed in the District Court on September 9, 1944:

> "That the refusal of the respondent, Title Insurance and Guaranty Company * * * to execute written evidence of the right of the Mount Gaines Mining Company to occupy, hold and operate the said mining claims, has cast a cloud upon the right and title of the Mount Gaines Mining Company to hold, operate and to sell and dispose of the ores mined on said Mount Gaines Mine, and will * * * depreciate the value of the assets of the said Mount Gaines Mining Company" (R. 35)

are both declarations by Hart as trustee, and a judgment by the District Court, that Hart as trustee never assumed said lease or any option therein. If Hart had assumed the lease he would thereby have "acquired such rights and obligations under the lease as the lessee had." (*Smith v. Hoboken, R. W. & S. C. Co.*, 328 U. S. 123-133, 90 L. Ed. 1123.)

The trustee's assumption of an executory contract operates as a complete transfer of all the bankrupt's contractual rights and contractual liabilities therein. (14 Collier on Bankruptcy, Vol. 4, p. 1255, par. 270.43; *Grief Bros. Cooperage Co. v. Mullins* (8 Cir.) 264 F. 391.) The transfer involves a complete elimination of the bankrupt, his discharge from his contractual relations and his replacement by the trustee. (*Rosenblum v. Uber* (3rd Cir.) 256 F. 584.)

In *Palmer v. Palmer* (2nd Cir.) 104 F. (2d) 161, the Court held:

> "A lease, being property cum onere, does not pass to a trustee in bankruptcy unless he adopts it."

This view was approved by the Supreme Court of the United States in *Smith v. Hoboken, R. W. & S. C. Co.*, 328 U. S. 123-135, 90 L. Ed. 1123. Moreover, the clerk of the District Court in the certificate attached to the transcript certified:

> "I further certify that after diligent search of the records I am unable to find any record in this court and in this matter of any adoption or assumption by James B. Hart, Trustee, of that certain mining lease dated December 16, 1933, a copy of which lease is attached to the petition of James B. Hart filed in this proceeding September 9, 1944 and designated Exhibit A thereto." (R. 148.)

and the Circuit Court of Appeals in the instant case states in its opinion that "no writing was found which expressly * * * provides" that Hart as trustee ever assumed the lease. (R. 1413.)

C.

The decision of the Circuit Court of Appeals that:

> "It would seem that lessors, by reason of their recognition of the operation of the mine by Hart, as trustee, and acceptance of the benefits resulting from such operation are in no position to question his assumption of the lease" (R. 1416)

is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit on the same matter in the case of *Model Dairy Co. v. Foltis-Fischer, Inc.*, 67 F. (2d) 704. The Court held in that case:

> "The receiver does not take over the term, when he goes into possession by the court's order, or before his own election. * * * The court puts

him there by its own power; the lessor has nothing to say about it. He must take what compensation the court chooses to give him, or he will get nothing; his acceptance cannot be a recognition of a termor whom he had no power to exclude."

D.

The decision of the Circuit Court of Appeals to the effect that

> "the assumption, rejection and automatic rejection provisions of Sec. 70b are inconsistent with and inapplicable to Chapter X reorganization proceedings" (R. 1418)

involves an important question of federal law which has not been, but should be settled by this Court, although it is not determinative of this case.

The importance of this question is apparent from a comparison of the opinion of the Circuit Court of Appeals in this cause with the decision in *Wiemeyer v. Koch,* 8 Cir., 152 F. (2d) 230, and the decision of this Court in *Finn v. Meighan,* 325 U. S. 300, 89 L. Ed. 1624.

In the case at bar the Circuit Court of Appeals held:

> "In the ordinary bankruptcy which Sec. 70b covers, the purpose is to liquidate the estate and to distribute the assets to creditors as soon as possible. Since continued operation of a lease held by the ordinary bankrupt is not contemplated, the trustee is required to decide whether the lease has any value, and if so, to dispose of

it quickly so that the assets realized may be added to the bankrupt's estate.

But in reorganization proceedings the purpose is rehabilitation of the debtor and to preserve it as a going concern if possible; therefore, it is vital that favorable leases be held and unfavorable leases be rejected. But often it cannot be decided by the trustee within 60 days after adjudication (particularly when the trustee is not appointed until some time after the adjudication) whether a lease is favorable or not from the standpoint of continued operation. Here the lease was the sole asset of the debtor and rejection of the lease would have ended any possibility of reorganization. Consequently, the debtor was ordered by the District Court to continue in possession under the lease until the plan of reorganization could be prepared, and when the lease was about to expire, the Court ordered the trustee to apply for a renewal in accordance with the terms of the lease.

The difference between this situation and the situation normal to the usual bankruptcy covered by Sec. 70b, is decisive, and, hence, we hold that the assumption, rejection, and automatic rejection provisions of Sec. 70b are inconsistent with and inapplicable to Chapter X reorganization proceedings.

Finn v. Meighan, 325 U. S. 300, cited by appellants, is limited, by a subsequent modification by the Supreme Court of its original opinion, to the forfeiture provisions of Sec. 70b, not here involved (325 U. S. 300, 302, 840)."

In *Finn v. Meighan,* Jr. 325 U. S. 300, 89 L. Ed. 1625, at page 301, this Court held:

"Childs Company operates a chain of restaurants. In August 1943 it filed a voluntary petition for reorganization under Chapter X of the Bankruptcy Act (June 22, 1938). * * *

* * * * * * *

"Congress granted the trustee sixty days (unless reduced or extended) in which to assume or reject a lease. Sec. 70(b) of the Bankruptcy Act as amended, 11 U.S.C.A. Sec. 110(b), 3 FCA Title 11, Sec. 110(b)."

It is to be remembered that this Court in its amended opinion in the *Finn* case left undisturbed therein the foregoing paragraph. Not having the record of this Court in the *Finn* case before us, we are unable to determine what effect should be given to *that* paragraph.

E.

The decision of the Circuit Court of Appeals to the effect that a trustee in a Chaper X reorganization proceeding in bankruptcy can assume a lease which is an asset of the debtor, merely by taking possession of the leased premises, operating it and paying rent or royalty to the lessors as called for by the lease, without obtaining an order of Court authorizing him to assume the lease and without any declaration by him in writing that he assumed it, involves an important question of federal law which has not, but should be, settled by this Court.

The importance of this question is patent by comparing the decision of the Circuit Court of Appeals in this case with the decision in *Wiemeyer v.*

Koch, 8 Cir., 152 F. (2d) 230, quoted under heading "B" on pages 19-20 hereof.

F.

The decision of the Circuit Court of Appeals to the effect that Hart as trustee had "sufficiently complied with the conditions precedent" in the option for a further lease which would be a ten year extension of the lease involved herein, is a decision of an important question of local California law in conflict with applicable California decisions and statutes, viz.:

Berhman v. Barto (1880), 54 Cal. 131, 70 A.L. R. 1219;

Swift v. Occidental Mining, etc. Company (1903), 141 Cal. 161, 173, 74 Pac. 700;

Waterman v. Banks, 144 U. S. 394, 36 L. Ed. 479;

Mariposa Construction v. Peters, 215 Cal. 134, 142, 8 Pac. (2d) 849;

Bourdien v. Baker, 6 Cal. App. (2d) 150, 44 P. (2d) 587;

Caldwell v. Delaray Mines, Inc., 68 Cal. App. (2d) 180, 156 P. (2d) 52.

California Civil Code, Section 1436:

"A condition precedent is one which is to be performed before some right dependent therein accrues, or some act dependent thereon is performed."

California Civil Code, Section 1439:

"Before any party to an obligation can require another to perform any act under it he must ful-

fill all conditions precedent thereto imposed upon himself * * *."

Rusconi v. Cal. Fruit Exch., 100 Cal. App. 750, 755, 281 Pac. 84;

De Falaise v. Gaumont-Butioli Corp., 39 C.A. (2d) 461, at 468-9, 103 Pac. (2d) 447.

California Civil Code, Section 1587:

"A proposal is revoked:

1. * * *

2. * * *

3. By the failure of the acceptor to fulfill a condition precedent to acceptance; * * *."

Bourdien v. Baker, 6 Cal. App. (2d) 150, 44 P. (2d) 587.

See dissenting opinion of Denman, C.J., to the decision of the Circuit Court of Appeals in the instant case. (R. 1434-1449.)

In the *Berhman* case the Supreme Court of California held (54 Cal. 131 at 134):

"Payment of rent when it becomes due, and performance of other covenants of a lease, under which a tenant in possession of leased premises with the privilege of renewing the lease at the end of the term, are conditions precedent to the exercise of the right of renewal. When, therefore, the defendant in this action, as tenant under the lease from the plaintiff, made default in payment of the last installment of rent at the time it became due, and failed to perform the covenants of the lease as to payment of taxes and assessment liens, her possession of the leased premises, after the expiration of the term, did not

operate as notice to plaintiff that she had elected to continue the term, nor did it work a renewal of the lease; for her right to renew depended upon the performance by her of her covenants in the lease.

In the *Swift* case, the Supreme Court of the State of California held (141 Cal. at 173, 74 Pac. p. 700):

> "We are not sure that the respondent means to contend that the failure of appellants to insist upon forfeiture of the lease for waste or breach of covenant, precludes them from refusing to grant another term though there are passages in his brief which seem to assert that proposition. If the contention is made it cannot be sustained. The waiver of the forfeiture is one thing; the renewal of the lease is quite another. The neglect of the landlord to strictly enforce his right of forfeiture for breach of condition does not entitle the tenant to a renewal when such renewal is dependent upon faithful performance of conditions."

It will be noted that the Circuit Court of Appeals in its decision herein refused to follow the decision in the *Swift* case upon the ground, as claimed by it, that it was dictum. (R. 1430.) Denman, C. J., in his dissenting opinion evidently considered that the decision in the *Swift* case was *not* dictum. (R. 1438-1439.) In any event it was at least a "considered dictum." And this Court has held that Federal Courts are bound to accept a "considered dictum" of the highest state Court as controlling.

In *Hawks v. Hammill,* 288 U. S. 52-58-59 (77 L. Ed. 610), the Court held:

> "At least it is a considered dictum and not comment merely *obiter*. It has capacity though it be less than a decision, to tilt the balanced mind toward submission and agreement."

In the *Waterman* case, which involves California local law, this Court held (144 U. S. 294, 36 L. Ed. 479):

> "On the other hand, it is well settled that when there is a contract between the owner of land and another person, and if such person shall do a specific act, then he (the owner) shall convey the land to him in fee, the relation of vendor and purchaser does not exist between the parties unless and until the act has been done as specified. The Court regards it as the case of a condition, in the performance of which the party performing it is entitled to a certain benefit; but in order to obtain such benefit he must perform the condition strictly. Therefore, if there be a day fixed for its performance, the lapse of that day without it being performed prevents him from claiming the benefit."

G.

The decision of said Circuit Court of Appeals to the effect that the District Court, pursuant to California Civil Code Sec. 3275, could relieve Hart as trustee from a "loss in the nature of a forfeiture" resulting from a termination of the option for a further lease because of the lessee's and the trustee's inability to comply with the conditions precedent in the option for a further lease, is a decision of an *important question of local law* in a way probably in conflict with applicable local decisions, viz.:

Briles v. Paulson, 170 Cal. 196, 149 Pac. 169;
Henck v. Lake Hemet Water Co., 9 Cal. (2d) 136, 69 P. (2d) 849;
Leslie v. Federal Finance Company, Inc., 14 Cal. (2d) 73, 80, 92 P. (2d) 910;
Wightman v. Hall, 62 Cal. App. 632, 217 Pac. 580, cited with approval in *Leslie v. Federal Finance Company, Inc.,* 14 Cal. (2d) 73, 80, 92 P. (2d) 910;
California Civil Code, Section 1492;
California Civil Code, Section 3275.

In the *Briles* case the Supreme Court of the State of California (170 Cal. 196, 149 Pac. 169), held:

> "The defendant could not convert the option into an agreement of sale, binding upon the plaintiff, except by complying with the conditions upon which the plaintiff had agreed to sell * * * Acceptance must be made and conditions performed within the time, if any, limited by the option, in order to constitute a contract of sale, time being of the essence in such contracts * * *. A court of equity would not be justified in relieving a party from the effect of his failure to comply with the conditions on which he had been granted the privilege of buying. This would be making a new contract for the parties, and compelling the owner to sell when he had not agreed to do so."

In *Henck v. Lake Hemet Water Co.* (1937), 9 Cal. (2d) 136, 69 P. (2d) 849, the Supreme Court of California laid down the rule that California Civil Code Section 3275 is not applicable to an option which involves a *condition precedent, neither is it*

applicable where time is expressly declared to be of the essence, as is the case in the action at bar. In that case the Court said in effect that California Civil Code Sections 3275 and 1492 apply only where there is a vested estate subject to be defeated by a *condition subsequent* and not in cases where there is a condition precedent as is the case where rights are classed under an option. (See Vol. 9 Cal. (2d), pp. 140-142.)

The Court in that case held (page 143):

> "The provisions of section 3275 are necessarily qualified by the language of Section 1492, so that generally in a case where time is made the essence of the agreement a party may not obtain relief under that section."

Following are the two Code Sections cited in the *Henck* case:

Section 1492 of the California Civil Code:

> "Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due * * *."

Section 3275 of the California Civil Code:

> "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

In the *Leslie* case the Supreme Court of California held (14 Cal. (2d) 73 at 80, 92 Pac. (2d) 906):

> "It is true that time is of the essence of the ordinary option contract and no forfeiture results from a strict performance of its terms, because an option is merely an offer to sell and vests no estate in the property to be sold. (Wightman v. Hall, 62 Cal. App. 632, 217 Pac. 580.)"

In the *Wightman* case, the District Court of Appeal of California (62 Cal. App. 632, 217 Pac. 580) held:

> "A full appreciation of the nature of an option precludes the idea that courts may allow the optionee time beyond that limited in the writing in which to accept the offer of the other party. With the lapse of time the right to exercise the option automatically expires. In this regard it is similar to an estate upon limitation, which terminates without any act of those claiming the estate to succeed to it. It is not necessary for the offerer of an option to notify the optionee that the offer is no longer open when the time limit has expired. It is not a case of cancellation of a right, for the right only existed up to a certain time and then ceased by the mere passing of that time."

This case was cited with approval in *Leslie v. Federal Finance Co., Inc.*, 14 Cal. (2d) 73 at 80, 92 Pac. (2d) 910.

Petitioners pray that a writ of certiorari be granted.

Dated, June 18, 1947.

EDWARD F. TREADWELL,
ARTHUR J. EDWARDS,
Attorneys for Petitioners.

LUTHER ELKINS,
Of Counsel for Petitioners.

FILE COPY

Supreme Court

October Term, 1947

No. [redacted] 145

TITLE INSURANCE AND GUARANTY COMPANY [illegible] HUMPHREY, HARRY LEE JONES, JULIAN M. EDWARDS and MARJORIE B. EDWARDS,

Petitioners (Appellants below),

vs.

JAMES P. HART, TRUSTEE OF MOUNT GAINES MINING COMPANY, Debtor,

Respondent (Appellee below).

Response to Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1947

No. 1511

TITLE INSURANCE AND GUARANTY COMPANY ELIZABETH HUMPHREY, HARRY LEE JONES, JULIAN M. EDWARDS and MARJORIE B. EDWARDS,

Petitioners (Appellants below),

vs.

JAMES P. HART, TRUSTEE OF MOUNT GAINES MINING COMPANY, Debtor,

Respondent (Appellee below).

Response to Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Ninth Circuit.

Statement of the Case.

The application for a writ of certiorari is another step along the tortuous path through the tangle of litigation that has beset the Mount Gaines mine. Could it speak, it surely would say that it rejoiced that this phase of the litigation had reached the end of the path.

The mine is located in Mariposa County, California, at no great distance from the Yosemite National Park. Some of the ground area included in what is called the Mount

Gaines mine is patented, but a considerable portion is still held under mineral locations, which are frequent sources of litigation.

Respondent does not believe that a discussion of the pleadings or facts, except as to facts recited in the decision of the circuit court or found by the district court, have any place in a statement of the case or argument. A petition for a writ raises no question of the sufficiency of the evidence to support the findings. It is necessary when questions of conflict with other decisions are raised to consider not only the respective statements of law but also to consider the facts in the respective cases to determine whether or not there is an actual conflict. But this court must of necessity confine its consideration to facts as they appear in the decision of the circuit court or the findings of the district court.

However, since petitioners have referred to statements in the pleadings and to evidentiary facts, it is perhaps proper for respondent to make some comments.

The respondent feels that a fair statement of the ultimate facts has been set forth in the majority opinion of the Circuit Court of Appeals and respondent adopts it.

There are some statements made in petitioners' statement of facts which respondent believes are misleading.

Petitioners cite numerous pages of the record in an attempt to show failure by lessee to keep complete records. No difficulty was experienced in arriving at the total returns or total payments of royalties. The difficulty arose

when the auditor was asked to give the status on some particular interim date, or to state whether a certain royalty payment applied to a certain shipment. This difficulty arose from various facts, not because the records were not kept. Perhaps the system could have been improved. But the auditor arrived at the total, checked it so far as returns from ores shipped was concerned with the smelter records, and the owners, it is assumed, kept their own records so they knew the royalties paid. They raised no question as to the correctness of the auditor's testimony in that regard.

Petitioners also make the statement that there were 43 violations of the regulations of the Industrial Accident Commission. Respondent does not know how that figure was reached. Respondent contended that the provision in the lease[1] had no application to the regulations of the Commission. The Circuit Court did not disagree with respondent's contention but stated that assuming the contention was not well taken the violations did not constitute a failure of faithful performance and gave their reasons for so holding. [R. 1427-1428.] The testimony of the representative of the Commission shows that these regulations were treated more as directives. He outlined what the mine inspector did, how he went through the mine with the book of regulations with him so he could check on himself. He stated the inspector made notes and handed

---

[1]All operations "shall be in accordance with the laws and mine and milling regulations of the State of California." [R. 39.]

a copy to the operator, that the original was sent to their office, that operator was notified and given ample time to make corrections. If these violations are so dangerous to life and limb as petitioners would argue, it certainly is a most lax way for the commission to protect human life.

The inference from the method used is borne out by the testimony of experienced miners. If we accept the testimony of these men, no operator would accept a lease which had a provision which might subject the lease to forfeiture if an inspector found a violation of these regulations. The testimony shows that rarely does an inspector go through a mine without finding something that does not comply with the regulations.[2]

The lessee had a most excellent record for safety in the operations.[3] Every alleged violation was promptly cor-

---

[2]John E. Steele, life-time miner and many years inspector of mines for an industrial insurance company, testified that not a mine in California would be in operation if 110 percent compliance with Industrial Accident Commission's regulations were required. [R. 3680.]

Francis Fredrick, consulting geologist and mining engineer, testified that: "It is a very rare thing to have a California State mine inspector go through a mine and not recommend some improvements * * * sometimes a very strict demand made for performance of regulations within thirty days, but they always allow some time for corrections, because those recommendations are not considered violations." [R. 249.]

[3]"Mount Gaines mine has been run in a very safe manner and with apparent due regard to safety measures," testimony Fredricks. [R. 250, last line.] Premium on insurance 25 percent below manual because of safety record. "Indeed a fine achievement." E. G. Lloyd, underwriting department insurance company. [R. 1046.]

rected except on one occasion when there was some delay, but the correction was made without any trouble for the mine or its operation.

The statement of petitioners with respect to delays in the payment of royalties on pages 11-13 of the petition are magnified by duplication. The first item $1358.70 is included in the third item on that page as can be seen by the date. The same item is again repeated at the bottom of page 12 and again included in the item on the top of page 13.

This item of underpayment occurred during the so-called Humphrey period; that is, when the Humphreys were in the control of the lessee corporation. During that period J. W. Humphrey claimed to be president and general manager of the Mount Gaines Co.

Neither J. W. Humphrey, C. F. Humphrey nor Arthur J. Edwards owned a share of stock in either the Mount Gaines M. Co. or its parent corporation, International M. & M. Co. except a certificate for 25,000 shares that J. W. Humphrey issued to himself and another, in trust. He signed the certificate himself once as vice president and again as secretary. There was no authority for the issuance and of course no consideration paid by Humphrey. A photostat of the certificate is in the record page 1074. The whole story of their temporarily gaining control is not told in this record but is sketched. [R. 1059-1078, 1127-1138.] There are about 1,200,000 shares of International M. & M. Co. stock outstanding, held by 2100 persons.

In any event near the end of April, 1938, J. W. Humphrey and two of his associate directors met with C. F. Humphrey and Arthur J. Edwards, the representatives of the owners who are now objecting to the extension. At that meeting the payment or nonpayment of the April 25th royalty was discussed. Just what transpired is not clear because information had to be procured from the unwilling lips of J. W. Humphrey. [R. 1155-1157.]

That event together with other incidents and evidence was sufficient to convince the district court that it was justified in making a finding that there were full accountings and payments of royalties due under the lease "except for a few payments prior to June 30th, 1939, which with the knowledge, acquiescence and collusion of the owners . . . were permitted to be deferred." [R. 125.]

Immediately after this default some stockholders became active and procured a hearing before the Superior Court of Mariposa County as a result of which the Humphrey group were ousted from the control and management of the company and State Court trustees were appointed.

The group still claimed to be directors and in June of 1939 filed the proceedings in reorganization. They were continued in possession for only two months. On the first hearing the present trustee was appointed. The stars have looked brighter to those who are really interested in the company ever since that appointment.

Petitioners also mention three delays in payment of royalties in 1936. The lease here involved recited that the title to the property was in dispute; that the lessor would attempt to clear the title but provided that in the event of his failure so to do he would not be liable. [R. 38.] The lessee was not required to perform on his part until he had been given notice that the title was clear. [R. 38.]

One A. G. Ilseng had procured an assignment from the original lessees Yates and Binns and he had also procured an assignment of a lease given by those claiming adversely to J. W. Humphrey, and who were in possession. In that way he was able to get into possession and to go ahead with the rehabilitation work. Litigation over the property dragged out and it was not concluded until sometime in 1937. The notice that the title was cleared; that is that J. W. Humphrey was the legal owner and W. H. Holcomb, Harry Lee Jones and C. F. Humphrey, the father of J. W. Humphrey were each the owners of a one-third beneficial interest, was given June 1st, 1937.

Under those circumstances the lessee should have held the royalties until the title was settled. This he did for a considerable period of time on the advice of the attorney for J. W. Humphrey. [R. 766.]

Ilseng prior to this time had organized the Mount Gaines Mining Co. as a wholly owned subsidiary of the parent corporation International Mining and Milling Co. and transferred the lease to that company.

Summary of Argument.

I.

GENERAL STATEMENT APPLICABLE TO ALL REASONS ADVANCED BY PETITIONERS.

II.

RESPONSE TO PETITIONERS' POINTS A AND D.

A. DECISION THAT REJECTION PROVISIONS OF SECTION 70b ARE INAPPLICABLE TO CHAPTER X PROCEEDINGS IS NOT IN CONFLICT WITH DECISION FROM EIGHTH CIRCUIT.

1. *Inconsistency between rejection provisions of 70b and provisions of Chapter X not considered in Wiemeyer decision.*
2. *Statement of law in Wiemeyer case dictum.*
3. *No supporting authority to statement of law in Wiemeyer case.*

B. NO IMPORTANT QUESTION OF FEDERAL LAW INVOLVED IN DECISION THAT CHAPTER X INCONSISTENT WITH REJECTION PROVISIONS OF 70b.

1. *Inconsistency too apparent to require interpretation.*
2. *Where inconsistency considered all decisions are in accord with decision in instant case.*

III.

RESPONSE TO PETITIONERS' POINTS B, C AND D.

A. DECISION IN RESPECT TO ASSUMPTION OF LEASE BY TRUSTEE NOT IN CONFLICT WITH THE WALKER OR WIEMEYER DECISIONS.

1. *Question of assumption not an issue in Walker case.*

2. *Statement in Walker case that court must order assumption of lease not in accordance with Bankruptcy Act.*
3. *In instant case District Court did order assumption of lease.*
4. *Wiemeyer case involved claim of lessor for rental at rate provided in lease.*
5. *Mining lease not burdensome to lessee.*
6. *There can be no presumption that payments of royalties are payments for reasonable value of use of premises.*
7. *There is no admission in the pleading that trustee had not assumed the lease.*

B. STATEMENT IN DECISION REGARDING RECOGNITION OF OPERATION OF MINE BY TRUSTEE NOT IN CONFLICT WITH MODEL DAIRY CO. DECISION.

1. *Model Dairy case is not a proceeding under any part of Bankruptcy Act.*

C. CIRCUIT COURT'S DECISION THAT TRUSTEE HAD ASSUMED LEASE DOES NOT RAISE AN IMPORTANT QUESTION OF LAW.

1. *Even Wiemeyer decision recognizes that assumption may be evidenced by acts.*

IV.

RESPONSE TO PETITIONERS' POINTS F AND G.

A. STATEMENT BY CIRCUIT COURT THAT THERE HAD BEEN SUFFICIENT COMPLIANCE WITH CONDITIONS PRECEDENT IS NOT IN CONFLICT WITH CALIFORNIA LAW.

1. *Quoted statement of C. C. A. was made in connection with determination that the evidence supported findings.*

2. *If claim of conflict is based on use of word sufficiently then contention must be that local law requires perfect performance.*

3. *At time lessors were requested to perform agreement to extend lessee had perfectly performed.*

4. *Code sections require performance of conditions precedent but do not define what constitutes performance of condition of faithful compliance.*

5. *Decisions cited by petitioners do not involve question of performance, facts so dissimilar that statements of law have no application.*

6. *Acceptance of royalties after default waives all prior defaults of any kind.*

B. REFERENCE TO SECTION 3275, CAL. C. C., NOT IN CONFLICT WITH LOCAL LAW.

1. *Decisions cited by petitioners do not hold that in a case like the instant case Section 3275 may not be considered and its equitable principles applied.*

2. *In California an agreement to renew creates a vested interest in the land in the lessee.*

3. *California decisions definitely recognize that relief may be granted in equity even where time is of the essence.*

4. *California decisions hold that relief may be granted under Section 3275 in cases involving conditions either subsequent or precedent.*

I.

GENERAL STATEMENTS APPLICABLE TO ALL REASONS ADVANCED BY PETITIONERS FOR ISSUANCE OF WRIT.

In all cases of claimed conflict either between different circuits or with decisions of state courts, "the general language of the opinions must be read in connection with the facts." *White v. Aronson,* 302 U. S. 16, 21, 58 S. Ct. 95.

In each instance of claimed conflict with decisions of other circuits or decisions of the highest courts of California, the petitioners have taken a sentence or a portion of a sentence out of the decision in this case and compared it with an equally isolated statement from the decision claimed to be in conflict. In every instance, when the facts of the instant case and the facts of the case with which it is claimed there is a conflict are considered, any appearance of conflict disappears.

II.

RESPONSE TO PETITIONERS' POINT A AND D.

Under point A, petitioners contend that the decision in the instant case holding that the rejection provisions of section 70b Bankr. Act are inconsistent with and inapplicable to Chapter X proceedings is in conflict with the decision from the 8th Circuit; and under point D, contend that the decision in the above-mentioned respect by the Court in the instant case involves an important question of federal law which should be settled by this Court. Because the two points are so closely related, respondent groups them for discussion.

A. Decision That the Rejection Provisions of Section 70b Are Inapplicable to Chapter X Proceedings Is Not in Conflict With a Decision From the Eighth Circuit.

The decision in the case of *Wiemeyer v. Koch*[1] by the Eighth Circuit is not in conflict with the holding in the instant case that: "the assumption, rejection and automatic rejection provisions of Sec. 70b are inconsistent with and inapplicable to Chapter X reorganization proceedings."

1. Inconsistency Between Rejection Provisions of 70b and Provisions of Ch. X Not Considered in Wiemeyer Decision.

In the *Wiemeyer* case the attention of the Circuit Court of Appeals was not called to the provisions of Chapter X which are in conflict with and inconsistent with the provisions of Sec. 70b relating to the assumption and rejection of executory contracts including leases.

Section 102 of the Bankruptcy Act[2] expressly excludes from application to reorganization proceedings all provisions of Chapters I to VII which are in conflict or inconsistent with provisions of Chapter X.[3] Section 70b is a part of Chapter VII.

The legal question decided by the above quoted statement of the Circuit Court in the instant case was the con-

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[1]152 F. (2d) 230.

[2]11 U. S. C. 502.

[3]"The provisions of chapters I to VII, inclusive, of this Act shall, *in so far as they are not inconsistent or in conflict with* the provisions of this chapter, apply in proceedings under this chapter:" (Emphasis added.) Sec. 102, Chapter X, Bankr. Act, 11 U. S. C. 502.

flict and inconsistency between the provisions of Chapter X and the provisions of Sec. 70b as applicable to the assumption or rejection of leases. That legal question was not touched upon in the *Wiemeyer* case. Therefore there is not that conflict in decisions on a question of law which requires the conflict to be settled by this Court.

2. Statement of Law in Wiemeyer Case Dictum.

A summary of the facts in the *Wiemeyer* case will disclose that the statement of law relied upon by petitioners as conflicting with the decision in the instant case was not necessary to the decision and is only dictum.

The lease involved in the *Wiemeyer* case provided it should terminate in the event of insolvency, assignment for the benefit of creditors, the appointment of a receiver, adjudication in bankruptcy or default in the payment of rental.[4]

The landowners, Wiemeyers, filed numerous petitions in the reorganization proceedings seeking an order restoring them to possession and cancelling the lease.[5]

One of these petitions was finally granted, the lease was cancelled and the landowners restored to possession.[6]

After the cancellation of the lease, the landowners filed a claim for unpaid rental. It was the decision of the District Court on that claim from which the appeal was taken.

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[4]*Wiemeyer v. Koch*, 152 F. (2d) 230, see last par. 231, *et seq.*

[5]See p. 232, 2d col.—233 of decision.

[6]See p. 233, 1st Col. of decision.

The issue of assumption or rejection of the lease was only incidentally involved, and was not necessary to the determination of the case.

The decision cancelling the lease and restoring the landowners to possession was a rejection **by the Court** of the lease. That rejection related back to the date of the approval of the petition. On that ground alone the landlord was only entitled to the reasonable value of the use and occupation of the premises.

3. No Supporting Authority to Statement of Law in Wiemeyer Case.

The statement in the *Wiemeyer* decision relied upon by petitioners is as follows:

> "The statutory presumption of rejection by non-action within the period of sixty days is a conclusive statutory presumption."

The only authority cited in the *Wiemeyer* decision for that statement is Collier on Bankruptcy, 14 Ed. Sec. 70.43, p. 1230.

At the cited place in that treatise the author is dealing solely with straight bankruptcy. But in a footnote on page 1233, the author calls attention to the distinction in reorganization proceedings.[7]

At another point in the treatise, the author distinctly states that the provisions respecting assumption or rejection of executory contracts and leases as contained in Sec. 70b of the Bankruptcy Act, does not apply to proceedings under Chapter X, because it is inconsistent therewith and refers to Secs. 102, 116(1), 202 and 216(4).[8]

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[7]Collier on Bankr., 14th Ed., Vol. 4, page 1233, note 30.
[8]Collier on Bankr., 14th Ed., Vol. 7, page 605.

No Important Question of Federal Law Involved in Decision That Chapter X Inconsistent With Rejection Provisions of 70b.

The question of the conflict or inconsistency between the provisions of Chapter X of the Bankruptcy Act and the provisions of section 70b of that Act respecting assumption or rejection of executory contracts does not involve an important question of federal law which should be settled by this Court.

1. Inconsistency too Apparent to Require Interpretation.

A brief review of the respective provisions of the two portions of the act will disclose that no interpretation is necessary to determine the conflict and inconsistency.

Sec. 70b vests in the *trustee* the power to reject an executory contract including an unexpired lease by affirmative act or by failing to act within sixty days.[1]

Section 116(1) of Chapter X of the Bankruptcy Act provides that the *judge may permit* the rejection of executory contracts *upon notice to the parties to the contract and other interested parties.*[2]

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[1]"Within sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property: Providing, however, that the court may for cause shown extend or reduce such period of time. Any such contract or lease not assumed or rejected within such time, whether or not a trustee has been appointed or qualified, shall be deemed to be rejected." (The pertinent portion of Sec. 70b, 11 U. S. C. A. 110b.)

[2]"Upon the approval of a petition, the judge may * * * permit the rejection of executory contracts of the debtor, except contract in public authority, upon notice to the parties to such contract and to such other parties in interest as the judge may designate." (Bankr. Act, Sec. 116(1); 11 U. S. C. A. 516 (1)).

By definition in Chapter X the term executory contracts includes unexpired leases on real property.[3]

A provision that the *judge may permit* a rejection is certainly inconsistent with a provision that the trustee may reject either by action or non action.

The provision that the judge may permit rejection upon notice to the parties to the contract and other interested persons is certainly inconsistent with a provision that the trustee may reject without notice to anyone.

Further, Congress by the use of the word "judge," precluded the referee from granting such permission. By definition the act provides that "Court" shall mean the judge or the referee,[4] but "judge" shall mean judge of a court of bankruptcy, not including the referee.[5]

Section 216(4), Chapter X of the Bankruptcy Act is equally inconsistent with the provisions of section 70b which are under discussion.

Section 216(4) provides, with an exception not here pertinent, that a plan of reorganization may provide for the rejection of any executory contract.[6]

Since a plan of reorganization must be approved by the judge[7] and confirmed by a majority of the stockhold-

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[3]Sec. 106(7), Bankr. Act; U. S. C. A. 506(7).

[4]Sec. 1(9), Bankr. Act; 11 U. S. C. A. 1(9).

[5]Sec. 1 (20), Bankr. Act; 11 U. S. C. A. 1(20).

[6]"A plan of reorganization under this chapter * * * (4) may provide for rejection of any executory contract except contracts in public authority." Sec. 216(4), Bankr. Act; 11 U. S. C. A. 616(4).

[7]Sec. 174, Bankr. Act; 11 U. S. C. A. 574.

ers[8] and two-third of the creditors[9] a right of rejection vested in the trustee could deprive the judge, the stockholders and the creditors from passing on the question of rejection.

If the provisions of section 70b of the Bankruptcy Act, respecting rejection of leases applied to reorganization proceedings an absurd condition would be created by the provisions of section 202, Chapter X of that act. The last mentioned section provides in substance that if "an executory contract shall be rejected pursuant to the provisions of a plan, or to the permission of the court given in a proceeding under this chapter, or shall have been rejected by a trustee or receiver in bankruptcy or a receiver in equity under a prior pending proceeding" any person injured, including a landlord, by the rejection, shall have a provable claim.[10] No place in the section is there any provision for a claim for damage by a landlord whose lease was rejected by a *trustee in the reorganization proceeding*, whether the rejection was brought about by affirmative act or automatically by lapse of time.

2. Where Inconsistency Considered All Decisions Are in Accord With Decision in Instant Case.

All decisions of federal courts, in which the conflict and inconsistency between the provisions under discussion of Sec. 70b and the provisions governing rejection of executory contracts in reorganization proceedings under Chapter X, is in question uniformly hold that the rejec-

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[8]Sec. 179, Bankr. Act, 11 U. S. C. A. 579.

[9]Sec. 179, Bankr. Act; 11 U. S. C. A. 579.

[10]Sec. 202, Bankr. Act; 11 U. S. C. A. 602.

tion provisions of Sec. 70b have no application to reorganization proceedings.

Some of the cases arose under 77B of the Bankruptcy Act prior to the amendment of 1938, but the provisions of 77B having to do with rejection of executory contracts were counterparts of the present provisions of Chapter X.[11]

The Court in *In re Cheney Bros.*, 12 F. Supp. 605 (D. C. Conn. 1935) holds that under the provisions of 77B the sole power to reject leases is vested in the judge.

The opinion written by Judge Conger of the Southern District of New York in the case of *In re Childs,* 64 F. Supp. 282 contains a most excellent analytical discussion of the conflicting sections and concludes with the determination that the rejection provisions of section 70b do not apply to reorganization under Chapter X.

In the opinion in the case of *Consolidated Gas, Electric Light and Power Co. of Baltimore v. United Railways and Electric Co. of Baltimore,* 85 F. (2d) 799, 805 (Second Circuit) it is stated:

> "In this connection, the distinction between the ordinary proceedings in bankruptcy and a proceeding under 77B (11 U. S. C. A., sec. 207) for corporate reorganization is significant. Bankruptcy contemplates the sale of the bankrupt's property and a distribution of the proceeds to the creditor; and the intervention of bankruptcy constitutes a breach

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[11]Sec. 116(1), Bankr. Act; 11 U. S. C. 516, *id.* prior to Amend. 77B (c5); 11 U. S. C. 207 (c5).

Sec. 216(4), Bankr. Act; 11 U. S. C. 616, *id.* prior to Amend. 77B (b6); 11 U. S. C. 207 (b6).

Sec. 202, Bankr. Act; 11 U. S. C. 602, *id.* prior to Amend. 77B (810; 11 U. S. C. 207 (b10).

of an executory contract, if the trustee does not elect to assume its performance, and gives rise to a proveable claim. Central Trust Co. v. Chicago Auditorium Ass'n., *supra.*" (240 U. S. 581, 36 S. Ct. 412, 60 L. Ed. 811.)

"Section 77B on the other hand, does not contemplate the surrender and sale of the debtors assets, but rather the transfer of the property, including executory contracts and leasehold estates not affirmatively rejected, to a reorganized body for the continuance of the business. An executory contract, therefore, remains in force in a proceeding under section 77B until it is rejected. It passes with the other property of the debtor to the reorganized corporation."

Considerable weight is added to the respondent's contention in this regard by the amendment ordered by this Court of its opinion in the case of *Finn v. Meighan,* 325 U. S. 300, 89 L. Ed. 1624.

The lease involved in that case expressly provided that it should terminate in the event of the lessee's bankruptcy or insolvency. Section 70b provides that such a forfeiture covenant is enforceable in bankruptcy and this Court held the provision applicable in Chapter X proceedings.

The original opinion, however, read: "But Congress has made section 70 applicable to reorganization proceedings under ch. X."[12] But on June 11 by order of Court[13] that sentence of the opinion was amended to read: "But Congress has made the *forfeiture provisions* of section 70 applicable to the reorganization proceedings under ch. X."

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[12]See 5 C. C. H. Sup. Ct. Serv. (1944-45), 1467, 1468.
[13]325 U. S. 840.

In footnote 2 to the opinion in that case it is stated: "As respects the rejection or assumption of leases under c. X see Secs. 116(1), 202, 216(4) . . . cf. Re Chase Commissary Corp. (D. C.) 11 F. Supp. 288." These are the identical sections to which attention has been directed in this response.

III.

RESPONSE TO PETITIONERS' POINTS B, C AND E.

The reasons advanced by petitioners under Points B, C and E all relate to contentions of petitioners that statements made in the opinion of the Circuit Court in passing on the question of the assumption of the lease by the trustee were in conflict with other decisions or raised an important question of federal law.

A. Decision in Respect to Assumption of Lease by Trustee Not in Conflict With the Walker or Wiemeyer Decisions.

The conclusion of the Circuit Court that the trustee had assumed the lease was not based only on the operation of the mine and the payment of royalties as inferred by petitioners under their Point B. The facts and circumstances considered by the Court are set forth in the opinion [R. 1413-1416].

The decision in the instant case that *all* the facts and circumstances showed an assumption of the lease is not, as argued by petitioners, in conflict with either *In re Walker*[1] or *Wiemeyer v. Koch*.[2]

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[1]93 F. (2d) 281 (2d Cir.).

[2]152 F. (2d) 230 (8th Cir.).

1. Question of Assumption Not an Issue in Walker Case.

The *Walker* case rose out of a proceeding in the bankruptcy court, brought by the landlord to require the debtor, who had been continued in possession, to surrender possession or for an order lifting the injunction against an eviction.

The basis of the claim of the landlord was a provision of the lease giving a right of reentry in the event of bankruptcy, insolvency or the appointment of a receiver.

The issue was whether acceptance by the landlord of payments from the trustee would toll the right of reentry.

The Court held that simply accepting such payments would not toll the right of reentry unless they were accepted as rent under the lease. If accepted as rent under the lease, the right of reentry would be tolled.

There was no issue of assumption or rejection of the lease involved in the *Walker* case.

2. Statement in Walker Case That Court Must Order Assumption of Lease Not in Accordance With Bankruptcy Act.

The statement in the decision as quoted by petitioners,

> "That such debtor" (debtor continued in possession) "does not pay as lessee; it may not do so, it is forbidden to affirm a lease without order of the Court,"

was not necessary to the decision and is not supported by any authority or provision of the Bankruptcy Act. Under Chapter X, and the same was true under section 77B, there is no provision respecting assumption of a lease, certainly no provision requiring an order of the Court.

Section 70a vests the title to all property of the debtor, with some exceptions not here pertinent, in the trustee. Executory contracts and leases are not among the exceptions.

The only provisions applicable to Chapter X proceedings respecting such leases and contracts is the power given to the "judge" to reject them after notice to interested parties,[3] or in the plan of reorganization.[4]

3. In Instant Case District Court Did Order Assumption of Lease.

However, even if the quoted statement from the *Walker* case correctly states the law, it is not in conflict with instant decision. In the instant case, there were orders of the District Court directing the affirmance of the lease.

On June 29th, 1939, the debtor, then continued in possession by order of Court, was directed to continue in possession of the mine under the terms of the lease, and to pay the royalties subject to the control of the Court by further orders. [R. bot. pp. 17-18.]

No further orders were made in this respect except the following:

On August 11th, 1939, Hart was appointed trustee and all assets of the debtor were ordered to be turned over to him. [R. 25.] The operation of the Mt. Gaines mine was the only business of the debtor. [R. par. IV, p. 3.]

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[3]Bankr. Act, Sec. 116(1); 11 U. S. C. 416(1).

[4]Bankr. Act, Sec. 216(4); 11 U. S. C. 616(4).

On November 24th, 1943, the trustee petitioned the District Court for authorization to make application for an extension of the lease stating:

> "The said lease and option to purchase are the sole assets of the 'debtor' and is a valuable asset and it is to the best interests of the creditors and stockholders . . . that said written application be made for the extension of said lease . . . under the same terms and conditions as the present existing lease and option." [R. 967.]

On Dec. 2, 1943, the District Court Judge made an order granting such petition directing that

> "the trustee . . . immediately file his written application and make demand for the extension of the 'lease' under the same terms and conditions." [R. 972.]

The right to the extension is embodied in the lease. While the order of Dec. 2, 1943 does not use the words "adopt" or "asume" it would be sacrificing substance to form to say that it did not constitute an order for adoption.

Even if there had been no adoption or assumption of the lease prior to the order of Dec. 2, 1943, that order would relate back to the filing of the petition in reorganization.

4. Wiemeyer Case Involved Claim of Lessor for Rental at Rate Provided in Lease.

The *Wiemeyer* case[5] arose out of a proceeding in the bankruptcy court by the landlord to recover unpaid rent

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[5]*Wiemeyer v. Koch*, 152 F. (2d) 230.

at the rate provided in the lease. The petition or claim of the landlord was not filed until after the lease had been cancelled on petition of the landlord. (See this Response, p. 13.)

So far as the effect of payments to the landlord, ordered by the Court, and paid by the trustee, is concerned, the decision holds that they would be presumed to be payments for the use and occupation, and not payments under the terms of the lease.

But the decision clearly recognizes that there might be circumstances which would show they were paid under the terms of the lease. If so, the Court held, such payment would constitute a recognition that the lease was assumed or in effect.

For a more complete discussion of the *Wiemeyer* case, see this Response, p. 13.

5. Mining Lease Not Burdensome to Lessee.

In the instant case, the Court determined from the facts, some of which are discussed in the opinion [R, 1412-1416], that the lease had been assumed.

The ordinary mining lease such as the one here involved cannot be said to be burdensome to the lessee because it provides for no fixed rental.[6] The only liability of the lessee is the payment of royalties dependent on production. It is not rental for use and occupation of the premises, but is compensation for the right to remove a portion of the substance of the land.

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[6]R. 37-43.

6. There Can be no Presumption That Payments of Royalties Are Payments for Reasonable Value of Use of Premises.

In the ordinary leases such as those involved in the *Walker* case and the *Wiemeyer* case, there are fixed monthly payments. As stated in those decisions, the payments that were made, even though in the amounts provided in the lease, would be presumed to be payment for the reasonable value of the use and occupation.

Such presumption could not be applied in the instant case because the amount paid each month greatly varied and was determined by production as shown by reports accompanying each payment.

From the time of the appointment of the trustee in August, 1939, to the termination of the first term of the lease, Dec. 15, 1943, prompt royalty payments were made and each payment was accompanied by a statement and a copy of the smelter returns which would show exactly how the trustee arrived at the amount of the payment. [R. top 996 and top 998.]

Since the value of the use and occupation of the mining property would be practically nil, its only value to the occupant being the right to remove minerals, the presumption mentioned in the *Wiemeyer* case[7] that payments to the lessor were for reasonable value of use and occupation could not apply in the instant case.

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[7]152 F. (2d) 230.

7. There Is no Admission in the Pleadings That Trustee Had Not Assumed the Lease.

On pages 20 and 21 of petition, there are references to statements made in the application of the trustee for an order authorizing him to procure an extension. In the application, the lease is referred to as an asset of the Mount Gaines Mining Company. Respondent assumes these references are made in an attempt to show that the trustee admitted he had not assumed the lease. This seems to be grasping at straws; there was no question about who was asking for the extension, or who was petitioning the Court. In reorganization proceedings the debtor continues to own the beneficial interest in the assets, but the trustee holds the legal title and it is his duty to protect the assets.

B. Statement in Decision Regarding Recognition of Operation of Mine by Trustee Not in Conflict With Model Dairy Co. Decision.

Petitioners contend in their petition, Point C, the statement in the decision of the Circuit Court of Appeals that:

> "It would seem that lessors, by reason of their recognition of the operation of the mine by Hart, as trustee, and acceptance of the benefits resulting from such operation are in no position to question his assumption of the lease."

is in conflict with the decision of Circuit Court of Appeals for the Second Circuit in the case of *Model Dairy Co. v. Foltis-Fischer, Inc.*[1]

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[1]67 F. (2d) 604.

1. Model Dairy Case Is Not a Proceeding Under Any Part of Bankruptcy Act.

The above quotation is a sentence lifted out of the opinion of the Circuit Court and is only a part of the reasons assigned.[2]

However, the statement even taken by itself is not in conflict with the cited decision.

The *Model Dairy Co.* case was not a proceeding in bankruptcy or reorganization. On petition of a single creditor, a receiver was appointed.

The lease contained a provision for re-entry in the event of the appointment of a receiver.

The Court held that the word "receiver" as used in the lease, "includes a receiver appointed in such a suit as this before us, though he does not take title. No receiver does, except when some statute so provides."[3]

The portion of the opinion quoted by petitioners is in connection with a question of the waiver by the landlord of his right of re-entry. It has no connection with the affirmance or rejection of a lease. However, in its opinion, the Court did state:

> "Though delay as such is immaterial, if the lessor elects not to re-enter his decision is final; it will be inferred from the receipt of rent accruing after the breach, or from any other recognition of the continuance of the term."[4]

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[2]See decision, R. pp. 1413-1416.

[3]67 F. (2d) 704, 706 (1, 2).

[4]67 F. (2d) 704, 706 (5, 7).

C. Circuit Court's Decision That Trustee Had Assumed Lease Does Not Raise an Important Question of Law.

Under Point E petitioners recite certain facts, which by no means include all the facts, and then contend the decision of the Circuit Court that the trustee had assumed the lease raises an important question of federal law necessary to be settled by this Court. They cite the *Wiemeyer*[1] case as illustrative of the importance of the question.

1. Even Wiemeyer Decision Recognizes That Assumption May be Evidenced by Acts.

Even if an assumption of a lease by the trustee in reorganization proceedings is necessary, unless that assumption can only be accomplished or evidenced by formal written declaration, the question is one of fact in each particular case.

While the *Wiemeyer* case does hold that payments by the trustee to the lessor will be presumed to be payments for use and occupation, and therefore, create no presumption of assumption of the lease, in the decision the Court discusses the facts to determine whether the presumption had been overcome.

The *Wiemeyer* case has been discussed at length in this response (p. 13 and p. 23).

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[1]*Wiemeyer v. Koch,* 152 F. (2d) 230.

IV.

RESPONSE TO PETITIONERS' POINTS F, G.

The reasons set forth by petitioners under their points F and G as to why they claim the writ should issue all relate to the conclusion of the Circuit Court that the evidence sustained the District Court's findings that there had been "faithful compliance" with the covenants of the lease during the first term.

A. Statement by the Circuit Court That There Had Been Sufficient Compliance With Conditions Precedent Is Not in Conflict With California Law.

Petitioners argue, under Point F, that the statement by the Circuit Court of Appeals that respondent had "sufficiently complied with the conditions precedent" is in conflict with California law.

1. Quoted Statement of C. C. A. Was Made in Connection With Determination That the Evidence Supported Findings.

The quotation is a portion of a sentence out of one paragraph of the opinion. A reading of the portion of the decision in which this paragraph appears discloses that the Court is discussing the sufficiency of the evidence to support a finding of faithful performance. This discussion commences with the statement: "The trial court found no deviation from faithful performance . . ." [R. top p. 1431] and continues to the phrase quoted by petitioners. [R. 1432.]

Petitioners do not point out just wherein they claim there is a conflict with California law. Because of the code sections and some of the decisions cited by petitioners there is an indication that their view is that the quoted statement is a holding that the performance of conditions precedent is not required. Of course that is not a correct construction of the statement. The Circuit Court did not hold that the performance of a condition precedent was unnecessary. The Court decided that the condition precedent in this case was "faithful compliance" with the terms of the lease. The Court then decided that the evidence was sufficient to support a finding by the trial court of faithful compliance. As pointed out it is that portion of the opinion that contains the quoted phrase.

The District Court found specifically that all royalties had been paid except $93.19 [R. 127] and the Court ordered that amount paid. The Court further found that "lessee has complied with all the laws of the State of California and has conducted their operations in accordance with the laws and mining and milling regulations of the State of California." [R. Finding, p. 129.] The Court generally found, that "the lessee has faithfully complied with all the agreements and covenants contained in said agreement of lease and option to purchase. That all the conditions precedent to be performed or to have occurred have been performed or have occurred." [R. Finding X, p. 129] and "that any deviation from strict compliance was the result of unintentional errors or constructions with respect to the lease." [R. Finding XII, p. 130.]

Respondent does not concede that the recitation of alleged defaults as contained in petitioners' statement of

facts or as set forth in the dissenting opinion present a true picture. The picture takes on an entirely different aspect when viewed in the light of other evidence, explaining, showing the acquiescence of lessors, the character of the defaults, the efficient safe operation of the mine, the length of the period of performance, ten years, the constant work and acts necessary to be performed, the accomplishments of the lessee and the benefits to the lessor. But respondent does not deem it necessary or proper to discuss the evidence with respect to its sufficiency because such discussion has no place in connection with a petition for a writ of certiorari.

2. If Claim of Conflict Is Based on Use of Word Sufficiently Then Contention Must be That Local Law Requires Perfect Performance.

Since petitioners under this point of their petition quote the phrase "sufficiently complied with conditions precedent" as being in conflict with California law it may be their contention that it is the use of the word "sufficiently" which gives rise to the conflict. That is, that under California law, there is no such thing as sufficient compliance to fulfill a requirement of faithful compliance.

In that event it would follow that petitioners contend there must have been full, exact, prompt and perfect performance over a full period of ten years to constitute "faithful compliance" under California law. If they should concede that a slight deviation from such perfect compliance would not, under California law, constitute a breach of a condition of faithful compliance, the question immediately would become one of degree and would have to be decided under the facts of each case. It would then be a question of fact.

3. At Time Lessors Were Requested to Perform Agreement to Extend Lessee Had Perfectly Performed.

Before reviewing the code sections and decisions cited by petitioners with respect to any requirement of perfect performance to comply with faithful compliance under the circumstances in this case, there is another factor it is well to have in mind. The underpayments of royalties mentioned in the instant case were underpayments at that time, or delays in payment. All royalties were paid before the end of the first term, except $93.19 to which the rule of deminimus was applied. The failure to strictly comply with the regulations of the Industrial Accident Commission were temporary. All such failures were promptly corrected. So that there had been complete performance at the time that the lessor was called upon to perform the agreement to extend the lease.

4. Code Sections Require Performance of Conditions Precedent but Do Not Define What Constitutes Performance of Condition of Faithful Compliance.

The California code sections cited by petitioners do not conflict with the quoted statement in the instant case.

Section 1439 Code of Civ. Proc., defines conditions precedent.

Under this defintion the requirement of faithful compliance was, as construed by the Circuit Court, a condition precedent to the right of an extension.

Section 1439 Code of Civ. Proc., provides that all conditions precedent must be fulfilled before the other party can be required to perform.

The trial court found that the lessee had faithfully complied with the terms of the lease and the Circuit Court held that the evidence supported that finding.

There is nothing in either of the cited sections that defines faithful compliance or that requires perfect performance to constitute faithful compliance.

5. **Decisions Cited by Petitioners Do Not Involve Question of Performance, Facts so Dissimiliar That Statements of Law Have No Application.**

A review of the decisions cited by petitioners discloses that none of them defines faithful compliance, none of them hold that what constitutes performance is not a question of fact and none of them hold that where there are deviations from perfect performance which are corrected and the benefits accepted by the other party before such other party is required to perform that such deviations constitute a breach of condition.

Some of the cases cited by petitioners involve options to purchase in nowise connected with a lease; as for example, the case of *Bourdiere v. Baker*.[1] In this case, the owner gave an option to purchase certain property for the total price of $25,000. The consideration paid for the option was $10. The option required the optionee to pay $25,000 on or before a certain date. This the optionee failed to do, and the optionor refused to accept belated or conditional performance.

The *Berhman v. Barto* case,[2] cited by petitioners did involve a claim of right to extension of a lease. The tenant

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[1] 6 Cal. App. (2d) 150, 44 Pac. (2d) 587.
[2] 54 Cal. 131, 70 A. L. R. 1219.

had failed to pay the last quarterly rent and had permitted a judgment for taxes to be entered against the property. The only determination of the Court was that by holding over after the term, the tenant had not created an extension. The defaults had not been cured.

The case of *Mariposa Construction Company v. Peters*[3] involved an option to purchase contained in a lease. The lessee was in default in the payment of rental at the time he gave the notice, and he never at any time paid or tendered the payment of the purchase price.

The case of *Caldwell v. Delaray Mines Inc.*[4] was a mere option to purchase mining property which provided for the payment of $2,000 upon the exercise of the option, and $300 per month until total purchase price of $100,000 was paid. Only $450 was paid on account of the $2,000. Nothing more was accepted by the optionor, or tendered by the optionee.

The case of *Rusconi v. California Fruit Exchange*[5] cited by petitioners did not involve a lease and there was a gross default, which was not cured before performance by the other party was demanded.

The case of *De La Flasie v. Graumont-Butioli Corporation*[6] cited by petitioners, involved a contract of employment and simply holds that plaintiff was entitled to recover damages for breach of the contract of employment. Performances by plaintiff was exercised on the ground that she had not been given the notice required.

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[3]215 Cal. 134, 8 P. (2d) 847.
[4]68 Cal. App. (2d) 180, 156 P. (2d) 52.
[5]100 Cal. App. 750, 281 Pac. 84.
[6]39 Cal. App. (2d) 461, 103 P. (2d) 447.

The case of *Swift v. Occidental Mining Company*[7] cited by petitioners, and much relied upon by them, arose out of a provision for an extension of an oil lease. The decision involved only the question of the sufficiency of the evidence to sustain the findings. It involved no issue of what constituted "faithful compliance" or what justified relief in equity. The default of lessee was not cured.

The trial court in that action found that the defendant, lessee, had complied with all of the covenants and conditions of the lease. The only issue considered by the Supreme Court was the sufficiency of the evidence to sustain such a finding. The lease required commencement of work within three months from the date of the lease and required continuous work in prosecuting the development of the lease to the end that it might be made productive of petroleum products. It further provided that any discontinuance of work for four months would terminate the lease.[8]

The Supreme Court held that the uncontradicted evidence showed there had been complete cessation of work on the lease for two periods of time; the first, for the period of eighteen months and, the second, for the period of ten months, and that no production had been developed on the property.[9] The Supreme Court reversed the decision of the trial court on the ground of insufficiency of evidence to sustain the finding.

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[7]141 Cal. 161, 74 Pac. 700.
[8]141 Cal. 161, 169, 74 Pac. 700, 702.
[9]141 Cal. 161, 170, 74 Pac. 700, 703, 2d col.

That statement quoted by petitioners was unquestionably purely dictum. The issue was, as stated, insufficiency of the evidence.

Even the language used in the *Swift* case and quoted by petitioners when given the only construction to which it is reasonably susceptible is not applicable to the instant case.

The Court in the *Swift* case said:

> "We are not sure that the respondent means to contend that the failure of appellants *to insist upon forfeiture* of the lease for waste or breach of covenant, precludes them from refusing to grant another term . . . The waiver of the forfeiture is one thing; the renewal of the lease is quite another. The *neglect of the landlord to strictly enforce his right of forfeiture* for breach of condition does not entitle the tenant to a renewal when such renewal is dependent upon faithful performance of conditions." (Emphasis added.)

The two phases, that are emphasized, clearly indicate that this statement of the Court simply means that because the lease was not cancelled by the landlord for the default during the first term does not preclude him from denying an extension.

The word *waiver* in the phrase, "The waiver of the forfeiture is one thing," must be construed to mean only the failure to declare a forfeiture. So far as appears from the opinion there was no waiver, in the sense of an agreement, or actions by the lessor which would have

precluded him from declaring a forfeiture and cancelling the lease.

The nature of the default in the *Swift* case was such that it could not be cured.

The total cessation of operations for approximately two and a half years could not be cured by later performance. The time that was passed could not be relived.

Equity could not have given relief from such a default. There could be no question about it being a wilful default. Also, there would be no possible way of measuring the damages suffered by the lessor because no evidence could be produced showing what production might have been secured from development operations during the periods of cessation of activities.

There was no contention that such default during the first term had been cured or had been waived in any manner.

6. Acceptance of Royalties After Default Waives All Prior Defaults of Any Kind.

In the instant case, any defaults by delays in the payment of royalties were cured by the subsequent payment thereof. Furthermore, *all* claimed defaults were waived by the lessor continuing to accept royalties after the defaults occurred. The evidence shows that there were no defaults in the prompt payment of royalties after the trustee took charge in August of 1939. [R. 996.] All failures to comply with regulations of the Industrial Accident Commission were corrected long before the expiration of the term.

Royalties were paid by the trustee and were accepted by the lessors from the trustee's appointment, August, 1939, until the end of the first ten-year period, December 15th, 1943. [R. 996.] All royalty payments were accompanied by copies of the smelter returns. [R. 998.]

Under California law, the acceptance of rent or royalties constitutes a complete waiver of *all* defaults that occurred prior to the payment and acceptance of the rent or royalties.

The case of *Kern Sunset Oil Co. v. Good Roads Oil Co.,* 214 Cal. 435, 440, 6 P. (2d) 71, 2d col. 73, was an action to declare a forfeiture of an oil lease on the ground that the drilling requirements as contained in the lease had not been complied with. The landlord, however, had continued to accept royalties from some producing wells that were on the leased property. The Court held:

> "The acceptance of rent by the landlord from the tenant, after the breach of a condition of the lease, with full knowledge of all the facts, is a waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of said breach. This is the general rule and is supported by ample authority." (Citing numerous cases.)

The Court further states that the acceptance by a landlord of rents is an affirmation by him that the contract is still in force, "and he is thereby *estopped from setting up a breach in any of the conditions of the lease,* and demanding a forfeiture thereof." (Emphasis added.)

B. The Reference to Section 3275 C. C. of California Not in Conflict With Local Law.

Under petitioners' Point G it is contended that any application of section 3275 of the Civil Code of California to this case is a decision of an important question of local law in conflict with applicable local decisions.

The above named section does not form the basis of the decision of the Circuit Court. The Court says: "Our conclusion in this regard is strengthened by section 3275 in the California Civil Code."[1]

1. Decisions Cited by Petitioners Do Not Hold That in a Case Like the Instant Case Section 3275 May Not be Considered and Its Equitable Principles Applied.

Under this point, petitioners cite several decisions which do not sustain their contention.

The case of *Briles v. Baulson*[2] cited by petitioners involved an option. The optionee did not comply with his agreement within the time limited and upon the elapse of the time the optionor gave notice that the option was cancelled. Nowhere in the decision is section 3275 mentioned.

The case of *Wightman v. Hall*[3] cited by petitioners, also cited in the dissenting opinion, arose out of an op-

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[1]"Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, wilful, or fraudulent breach of duty."

[2]170 Cal. 196, 149 Pac. 169.

[3]62 Cal. App. 632, 217 Pac. 580.

tion to purchase property. The price fixed in the option was not paid within the time limited and when it was tendered approximately one month later, the tender was refused. Section 3275 is not mentioned in the decision.

In the case of *Leslie v. Federal Finance Company, Inc.*,[4] cited by petitioners and also cited in the dissenting opinion, a stipulation and interlocutory decree was entered into which gave to the plaintiff in effect an option to purchase a parcel of property that had been formerly owned by the plaintiff. It provided for the unconditioned payment of a fixed price on or before a certain date. The stipulation and decree very definitely provided that the money must be paid not later than the day named. The plaintiff in that case defaulted; nevertheless, the Court relieved the plaintiff of the default.

The court in the *Leslie* case quoted from section 3369, Cal. Civ. Code[5] and quotes section 3275, Cal. Civ. Code[6] and in connection therewith states: "These sections have been applied in numerous cases."[7]

Later in the decision it is stated: "it is true that time is of the essence of the ordinary option contract and no forfeiture results from a strict enforcement of its terms because *an option is merely an offer* to sell and *vests no estate in the property* to be sold." (Emphasis added.) However, the court held it was not a case of a strictly option contract and granted relief from forfeiture by virtue of the provisions of section 3275, Cal. Civ. Code.

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[4]14 Cal. (2d) 73, 92 P. (2d) 910.

[5]"Neither specific nor preventative relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law—."

[6]See Note 1.

[7]14 Cal. (2d) 73, 79, 92 P. (2d) 906, 909(1).

2. In California an Agreement to Renew Creates a Vested Interest in the Land in the Lessee.

The Supreme Court of California has definitely decided that an agreement contained in a lease for an extension or renewal *does vest an estate or interest in the property in the lessee.*[8] Since, as the Supreme Court said, "the right of renewal constitutes a part of the tenant's interest in the land," its loss by reason of a default would constitute a "forfeiture or a loss in the nature of a forfeiture," and therefore, neither could it be said to be an *ordinary option.*

The case of *Henck v. Lake Hemet Water Company*[9] cited by petitioners, involved a water contract whereby the defendant agreed to furnish water to the plaintiff on payment of an annual sum of money. The contract made the payment of money a condition precedent to the right to receive water. The plaintiff defaulted in the payment of one annual installment and the defendant upon such default terminated the contract as provided therein. In the decision, sections 1492 and 3275 of the Civil Code of California are quoted and the court states:

> "The provisions of section 3275 are necessarily qualified by the language of section 1492, so that *generally* in a case where time is made the essence

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[8]"The interpretation of this section (1462, Civil Code), brings the covenant directly within the meaning of the statute, because obviously a covenant for a renewal of a lease is for the direct benefit of the estate granted. In Taylor on Landlord and Tenant the rule is thus stated at section 262: 'The right of renewal constitutes a part of the tenant's interest in the land, and so a covenant to renew is binding upon the assignee of the reversion.'"

Standard Oil Co. v. Slye, 164 Cal. 435, 442, 129 Pac. 589, 591, 2d col.

[9]9 Cal. (2d) 136, 69 P. (2d) 849.

of the agreement a party may not obtain relief under that section. (Collins v. Eksoozian, 61 Cal. App. 184 (214 Pac. 670).) In the cited case, however, *relief was granted on the ground that even though time was an essential element that showing justified the interposition of a court of equity.*" (Emphasis added.)

3. California Decisions Definitely Recognize That Relief May be Granted in Equity Even Where Time Is of the Essence.

In the *Henck* case, from which the above quotation is taken, as in the *Collins* case cited in the quotation, the Court determined that even though time was an essential element the showing justified the interposition of a court of equity and granted relief from the default.

The case of *Crowell v. City of Riverside,* 26 Cal. App. (2d) 566, 581, not cited by petitioners but cited in the dissenting opinion, involved a breach of a condition in a lease against subletting. In its decision, the Court quotes several passages from McAdam on Landlord and Tenant as to the general rules of equity in such cases and then quotes section 3275 of the Civil Code of California. The Court did not hold that section 3275 was inapplicable. In fact it applied the section but held that the execution of a sublease *was a deliberate, voluntary* and *intentional act* and consequently it *could not be treated as otherwise than "wilful"* and therefore clearly came within one of the exceptions to the granting of relief as contained in section 3275, California Civil Code, and likewise held a subletting was a breach of condition not susceptible of being compensated in money.

4. California Decisions Hold That Relief May be Granted Under Section 3275 in Cases Involving Conditions Either Subsequent or Precedent.

In a very recent case the California Supreme Court held that section 3275, California Civil Code, in a proper case was applicable to a contract involving conditions either precedent or subsequent.

> *O'Morrow v. Borad,* 27 Cal. (2d) 794, 167 P. (2d) 483, 487.

That case involved a provision in a public liability insurance policy making it a condition to liability of the insurer that the insured cooperate in the defense of any claim.

In its opinion the Court states that such a condition has been sometimes held to be a condition subsequent and sometimes held to be a condition precedent "but regardless of the name given to the provision the insurer is ordinarily released—" but "forfeitures, however, are not favored; hence a contract, and conditions in a contract, will if possible be construed to avoid forfeiture." (Citing cases.) "This is particularly true of insurance contracts." (Citing cases.) "And where, as in the insurance policies held by O'Morrow the condition is express and cannot be avoided by construction, the Court may in a proper case excuse compliance with it, or give equitable relief against enforcement. (See Civ. Code, sections 3275, 3369.)" (Citing numerous California decisions.)

In addition to reviewing the cases cited by petitioners under their points F and G and showing that they do not support petitioners' contention, respondent has cited decisions of the California courts that an agreement in a lease for an extension vests an interest in the land in

the lessee and is not an ordinary option, and that section 3275, California Civil Code, may be applied to a case where time is made of the essence and also in cases of conditions subsequent or precedent.

Respondent has cited a California decision that the acceptance of royalties after default waives all defaults.

Furthermore respondent contends that in this action at the time petitioners were requested to comply with their agreement for an extension any defaults that had existed had been cured and at that time there was no question of faithful compliance.

Respondents contend that even in an ordinary option contract with time of the essence and providing for monthly payment for a year as a condition precedent to an obligation of the optionor to convey if the optionor accepts belated payments during the year he may not refuse to convey if at the end of the year he has received and accepted the full option price. There is certainly no California decision to the contrary of that statement, and it illustrates the situation in the instant case.

Respectfully submitted,

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FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1947

No. 511 145

TITLE INSURANCE AND GUARANTY COMPANY, ELIZABETH HUMPHREY, HARRY LEE JONES, JULIAN M. EDWARDS and MARJORIE B. EDWARDS,
Petitioners (Appellants below),

vs.

JAMES P. HART, Trustee of Mount Gaines Mining Company, Debtor,
Respondent (Appellee below).

PETITIONERS' REPLY BRIEF.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No. 1511

TITLE INSURANCE AND GUARANTY COMPANY, ELIZABETH HUMPHREY, HARRY LEE JONES, JULIAN M. EDWARDS and MARJORIE B. EDWARDS,
Petitioners (Appellants below),

vs.

JAMES P. HART, Trustee of Mount Gaines Mining Company, Debtor,
Respondent (Appellee below).

PETITIONERS' REPLY BRIEF.

I.

See Response, p. 12.

DECISION IN INSTANT CASE IS IN CONFLICT WITH THE DECISION IN WIEMEYER v. KOCH.

Respondent states (p. 12):

The decision in the case of *Wiemeyer v. Koch* by the Eighth Circuit is not in conflict with the holding in the instant case that: "the assumption, rejection

and automatic rejection provisions of Sec. 70b are inconsistent with and inapplicable to Chapter X reorganization proceedings".

Respondent's argument:

"The legal question decided by the above quoted statement of the Circuit Court in the instant case was the conflict and inconsistency between the provisions of Chapter X and the provisions of Sec. 70b as applied to the assumption or rejection of leases. That legal question was not touched upon in the *Wiemeyer* case. Therefore there is not that conflict in decisions on a question of law which requires the conflict to be settled by this Court." (Res. pp. 12-13.)

In the *Wiemeyer* case, the Circuit Court of Appeals for the Eighth Circuit determined that the first two sentences of Sec. 70b referred to in the above quotation from the decision in the instant case *did* apply to Chapter X reorganization proceedings. This determination necessarily involved a determination by that Court in that case that the said two sentences of Sec. 70b were not in conflict with or inconsistent with sections 116(1) and 216(4) or any other provision of Chapter X.

II.

See Response, p. 13.

DECISION IN WIEMEYER CASE NOT DICTUM.

Respondent states (p. 13):

"A summary of the facts in the *Wiemeyer* case will disclose that the statement of law relied upon by petitioners as conflicting with the decision in the instant case was not necessary to the decision and is only dictum."

This claim by respondent is denied by petitioners.

In the *Wiemeyer* case the decision states (p. 233):

> "A hearing was held on various claims including that of appellants, and on October 2, 1944, the court entered an order disallowing appellants' claim, the action of the court being based on the fact that no order of this court was ever made authorizing the temporary trustee to affirm or adopt the lease * * * and the same was not so affirmed or adopted, hence the claimants are not entitled to the allowance of any sum by way of rent as such."
>
> * * * * * * *
>
> "In seeking reversal of this order denying their claim appellants contend: (1) No formal election under an order of court was necessary to make the lease binding between appellants and the debtor; (2) the trustee elected to keep the lease in effect by his position taken during the proceedings; (3) the evidence is not sufficient to sustain the allowance of $1800 per year; the lease furnishing the measure of the allowance to be made." (*Wiemeyer v. Koch*, 152 F. 2d 230 at 233.)

From the foregoing it appears that the issue of law on the appeal in *Wiemeyer v. Koch* was whether or not the trustee had assumed the lease, and that the Circuit Court of Appeals for the Eighth Circuit in that case held that the trustee had not assumed the lease and would be deemed to have rejected the lease because he neither assumed nor rejected it within the time limited in the first two sentences of Section 70-b (pp. 233-234.)

III.

See Response, p. 13.

THE DECISION IN THE INSTANT CASE TO THE EFFECT THAT THE FIRST TWO SENTENCES OF SECTION 70b ARE INCONSISTENT AND INAPPLICABLE TO CHAPTER X INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

(1) Respondent asserts on page 13 that the conflict between Section 70b and Chapter X referred to in the decision in the instant case (R. 1418) is obvious and therefore no important federal question is involved. Respondent ignores the fact that the Circuit Court of Appeals for the Eighth Circuit in its decision in *Wiemeyer v. Koch* (8 Cir.), 152 F. (2d) 230, did not discover any such conflict for it held in that case that the first two sentences of Section 70b *did apply* to Chapter X reorganizations. (See Petition p. 17.)

(2) Respondent on pages 17 and 18 of his response states:

"All decisions of Federal Courts, in which the conflict and inconsistency between the provisions under discussion of Section 70b and the provisions governing rejection of executory contracts in reorganization proceedings under Chapter X, is in question uniformly hold that the rejection provisions of Section 70b have no application to reorganization proceedings". This statement by respondent does not square with the facts.

The only one of the three cases cited by respondent in support of his said claim which holds that Section 70b is inconsistent with Sections 116(1), 202, and 216(4) of Chapter X is *In re Childs* (D.C.S.D.N.Y., 1945), 64 F. Supp. 282.

The decision in *In re Childs* is based primarily on the assumption that a trustee in a Section 77B or a Chapter X reorganization has no authority to assume or *reject* a lease without an order of Court. The decision holds:

> "Under Sec. 77B and particularly Sec. 77B (c) (5), the rule was laid down that a trustee in a reorganization proceeding under Sec. 77B had no such authority to adopt or reject a lease without authorization from the court; that power to reject or assume a lease was not lodged in the debtor or in the trustee but devolved exclusively upon the judge. In re Cheney Bros., D.C.12, F.Supp. 605; Gerdes on Corporate Reorganizations, page 1137, Section 694. Compare In re Walker, 2 Cir., 93 F. 2d 281, 283."

The rule announced in *In re Cheney Bros.* and *In re Walker* cited in *In re Childs* to the effect that a

trustee has no authority to assume a lease without order of Court, seems to have been overruled or at lease modified by this Court in 1941 in the case of *Philadelphia Company v. Dipple,* 312 U. S. 168-176, 85 L. Ed. 651 at 655. Strangely enough this Supreme Court case was not referred to in *In re Childs.*

Philadelphia Company v. Dipple holds:

> "Notwithstanding the fact that Sec. 77B gives no specific authority to trustees in reorganization to reject burdensome leases or contracts, it is well settled that they have that right and are accorded a reasonable time within which to exercise it."

And this Court in 1943 in *Institutional Investors v. Chicago M. St. P. & R.,* 318 U. S. 523-578 at 549, 87 L. Ed. 859 at 999, refused to hold that *only* burdensome leases may be rejected by the trustee or Court in Section 77B reorganizations. The Court held:

> "We do not need to determine however what is the scope of the authority to reject leases under Sec. 77B either by the trustee or pursuant to a plan of reorganization."

(3) Since the decision in *In re Childs* was rendered, two Federal Court decisions having a bearing on the question as to whether or not the first two sentences of Section 70b apply to Chapter X reorganizations have been handed down. In *Finn v. Meighan,* 325 U. S. 300, 89 L. Ed. 1624, decided May 21, 1945, this Court in a Chapter X reorganization proceeding states: "Congress granted the trustee

sixty days (unless reduced or extended) in which to assume or reject a lease. Section 70b of the Bankruptcy Act as amended * * *." We make bold to presume that this Court in that decision thereby intended to suggest that a second and more impelling legal reason for denying the trustee's claim that he had the right to assume the lease therein involved should have been urged on that appeal, viz.: That the trustee, *by failing to assume or reject the lease wtihin sixty days after the adjudication,* would be deemed to have rejected the lease under the said provisions of Section 70b. This presumption is strengthened by the fact that when this Court amended its decision in the *Finn* case on June 11, 1945, after it had taken into consideration Sections 116(1), 202 and 216(4) of Chapter X, it still retained in its decision the said statement to the effect that: "Congress granted to the trustee sixty days (unless reduced or extended) in which to assume or reject a lease. Section 70b of the Bankruptcy Act * * *."

The second recent Federal Court decision which is in conflict with *In re Childs* is *Wiemeyer v. Koch* (8 Cir.), 152 F. (2d) 230, decided December 26, 1945. The decision in this case does not refer to *In re Childs.* (See Petition p. 17.)

IV.

See Response, p. 21.

THERE IS CONFLICT BETWEEN THE DECISION IN THE INSTANT CASE AND THE DECISION IN IN RE WALKER AS TO WHETHER A TRUSTEE CAN ASSUME A LEASE WITHOUT ORDER OF COURT.

(1) Respondent on page 21 states:

"Question of assumption not an issue in *Walker case.*"

Petitioners maintain that there is such an issue, unless *In re Walker* was overruled by implication by this Court in *Philadelphia Company v. Dipple, supra.*

In *In re Walker* (2 Cir.), 93 F. (2d) 281, which was a Section 77B reorganization proceeding, the lessors petitioned the District Court to lift the injunction against their evicting the debtor retained in possession as trustee or to direct the debtor to surrender possession of the leased premises. They alleged that the debtor had: "* * * forfeited the term because (1) the reorganization proceedings was one in bankruptcy; (2) because the term had devolved by operation of law upon the debtor in a new capacity; * * *"

> "Lessors' petition was referred to the referee as special master and he reported that the lessors had lost any power to forfeit the term which they might have had by accepting the payments of rent made to them by the debtor. Upon review, the District Judge reversed the special master holding that the payments made were not to be considered as rent, and that they did not

toll the reentry. The debtor appealed. On the appeal, the Circuit Court of Appeals for the Second District held:

"Such a debtor does not pay as lessee; it may not do so, it is forbidden to affirm the lease without order of court, and the payment of rent as rent would be as much an affirmance, if lawful, as is the lessor's 'acceptance'. Its position as debtor, 'continued in possession', is for all practical purposes that of a trustee or receiver as we have said * * * for rent could not possibly become due until affirmance."

V.

See Response, p. 22.

NOT TRUE THAT DISTRICT COURT IN INSTANT CASE ORDERED AFFIRMANCE OF LEASE.

On page 22 respondent states:

"However, even if the quoted statement from the *Walker* case correctly states the law, it is not in conflict with the instant decision. In the instant case, there were orders of the District Court directing the affirmance of the lease." Petitioners assert this statement is not supported by the facts.

The first pretended "affirmance" order was contained in the order of "adjudication" made June 29, 1939. (R. 17-18.) This order, instead of directing the debtor to assume the lease, as is claimed by respondent, directed the debtor to take over the leased mine

and to operate *in total disregard of the lessors' rights under the lease,* viz.:

"The lessee shall pay as a royalty to the owner ten per cent (10%) of all production of and from said mine." (R. 39.)

The District Court in its said order directed that the lessors should be paid royalties from the smelter returns *after all "administrative and operation expenses" including "taxes" and "adequate working capital" and "capital expenditures"* had been deducted and paid. (R. 18.)

Furthermore, on the same day that the District Court made its said order, it made this further order:

"That the debtor shall be allowed until September 10, 1929, unless the time be extended further by order of this Court, within which to report to this Court as to the advisability of rejecting any contract of the debtor, executory in whole or in part; and continued operation of the debtor, under any of said contracts within said period allowed for such reports, and until the order directing such rejection, shall not be deemed to conclude this Court or the debtor in respect of such election or to constitute an election." (R. 22.)

The second *pretended* "Order of Affirmance" claimed by respondent is the order of the District Court made December 2, 1943, in which order the District Court states:

"It is therefore ordered and adjudged that James P. Hart, the trustee of the above named

debtors * * * immediately file his written application and make demand for the extension of the agreement of lease with option to purchase now owned by the Mount Gaines Mining Company * * * and to take all steps necessary for securing such extension. Said written application and demand to be made upon the Title Insurance and Guaranty Company, a corporation, now the owner and trustee for the owners of the said mining claims." (R. 972.)

Respondent on page 23 of his Response states:

"While the order of December 2, 1943, does not use the word "adopt" or "assume" it would be sacrificing substance to form to say that it did not constitute an order of adoption."

Petitioners submit that there is no basis for respondent's claim that the order of the District Court made December 2, 1943 (R. 972), was intended by that Court to be an order directing the trustee to assume the lease for the reason among others, that the petition of trustee Hart, which was the basis for such order (R. 964-970), did not reveal: "to the Court a proposal to *assume the lease in its entirety,* and it cannot be said from the record that the trial judge knew or even suspected that he was being called upon to approve or adopt the *entire* contract." (*Wiemeyer v. Koch,* 8 Cir., 152 F. (2d) 230-234. See Petition herein, pp. 19-20.) (Italics ours.)

Furthermore it appears from trustee Hart's response herein that he and his attorney believe *now* (as they did in 1943), that in a Chapter X reorgan-

ization proceeding it is not necessary for the trustee to assume or adopt a lease which is an asset of the debtor in order to exercise the powers of the lessee therein, for he states in his Response, pp. 21-22:

"* * * Under Chapter X and the same was true under Section 77B, there was no provision respecting assumption of a lease, certainly no provision requiring an order of the Court. Section 70a vests the title to all property of the debtor, with some exceptions not here pertinent in the trustee. Executory contracts and leases are not among the exceptions."

That trustee Hart did not understand that the said order of October 2, 1943, directed him to assume the lease appears clearly from the record. All that he did pursuant to said order was to serve a written application on the lessor which cannot be tortured into a declaration that he thereby elected to assume the lease *cum onere*. (R. 52-54.)

VI.

See Response, p. 28.

HOW AND WHEN A TRUSTEE IN A CHAPTER X REORGANIZATION PROCEEDING CAN ASSUME A LEASE WHICH IS AN ASSSET OF THE DEBTOR'S ESTATE IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The Circuit Court of Appeals in the instant case held:

"Appellants argue that Hart as trustee has never assumed the lease. While no writing is found which

expressly so provides, the facts and circumstances clearly demonstrate that he did." (R. 1413.)

See facts and circumstances referred to in the decision. (R. 1413, 1414 and 1415.)

In the *Walker case* the Circuit Court of Appeals for the Second Circuit held that the trustee: "* * * is forbidden to affirm (assume) a lease without order of court" (see Petition, p. 19); and in *In re Childs,* D.C.S.D.N.Y., 64 F. Supp. 282, at 286, cited by respondent, the District Court held:

> "In the final analysis it is the court who has the last say. It is the duty of the court to say whether or not a lease should be rejected or assumed by the trustee."

In the *Wiemeyer case* the Court held:

> "Here there was no formal adoption of the lease either within the sixty days limited by the statute nor at any subsequent time. The court, however, from time to time ordered payment of the rent as provided in the lease and the payments made by the trustee were all at the rate so provided. It is insisted that this was tantamount to an adoption of the lease but the lease was certainly not assumed within sixty days from the adjudication and it was therefore deemed to be rejected. The statutory presumption of rejection by nonaction within the period of sixty days is a conclusive statutory presumption." (*Wiemeyer v. Koch,* 8 Cir., 152 F. (2d) 230-234.)

This Court held in *Philadelphia Company v. Dipple,* 312 U. S. 168-176, 85 L. ed. 651 at 655:

> "Notwithstanding the fact that Sec. 77B gives no specific authority to trustees in reorganization to reject burdensome leases or contracts, it is well settled that they have the right and are accorded a reasonable time within which to exercise it."

And this Court in *Institutional Investors v. Chicago M. St., P. and P.*, 318 U. S. 523-578 at 549, 87 L. ed. 959 at 999, after referring to its decision in *Philadelphia v. Dipple, supra,* and other cases, held:

> "We do not need to determine however what is the scope of the authority to reject leases under Sec. 77 either by the trustee or pursuant to a plan of reorganization."

We submit that considering the number of petitions filed and being filed in the various United States District Courts by corporations for reorganization under Chapter X, the uncertainties in the minds of lawyers and district judges and judges of the Circuit Courts of Appeals as to whether the first two sentences of Section 70b do or do not apply to Chapter X reorganization proceedings, also whether or not a trustee in a Chapter X proceedings may assume or reject a lease without an order of Court authorizing him so to do and the serious financial loss which may result from the failure of a trustee to assume or reject a lease in the manner required by the law which is not yet determined, particularly one which contains one or more options to purchase or for renewals or extensions, we submit that the questions of law referred to under headings "E" and "F" of the Petition herein

are "important questions of federal law which have not been but should be settled by this court".

VII.

See Response, pp. 29-37.

THE DECISION IN THE INSTANT CASE THAT HART AS TRUSTEE "SUFFICIENTLY COMPLIED WITH THE CONDITIONS PRECEDENT" IN THE OPTION FOR A FURTHER LEASE IS IN CONFLICT WITH IMPORTANT LOCAL CALIFORNIA LAW.

Respondent states, page 29:

"Statement by the Circuit Court that there had been sufficient compliance with conditions precedent is not in conflict with California law."

The Circuit Court of Appeals in the instant case held:

"Viewed against this background and against the background of the due diligence exercised by appellee in his faithful performance of the lease, we think he has sufficiently complied with the conditions precedent." (R. 1432.)

The said decision was rendered in the face of the following admitted breaches of the terms and conditions of the lease by the lessee and by Hart as trustee, viz.:

(1) Admission of H. K. Trask, one of the managers of the Mount Gaines Mine for the lessee:

"Royalties for March (1938) were already in arrears when the trustees took over control. For the

month of April production at the mine was barely sufficient to meet running expenses and certain other emergency and absolutely necessary heavy expenditures in the first half of May. The trustees were therefore compelled to let the April royalty go to default. It is now hoped that the earnings are improving sufficiently to make possible the gradual clearing off of these arrears. The owners of the Mount Gaines Mine property have been apprised of present conditions and the trustees have not had from them any word as to their attitude in the matter." (R. 562-563.)

(2) Testimony of J. W. Humphrey, president of Mount Gaines Mining Company:

"A. Some time around the latter part of April, '38.

Q. And it was held after there was a default in the payment of the entire royalty that was due on the 25th day of April, 1938, was it not?

A. That is right.

* * * * * * *

A. I had telegraphed to the other directors * * * that there would not be enough money on hand to pay the workmen's compensation insurance, to pay the power bill, and to pay the payroll. Non-payment of the payroll in California in a mine is a felony; and also not enough money to pay the royalty for the product sold during the month of March, so that we were faced with the proposition of either paying the royalty and taking the chance of committing a felony, or not paying the royalty and not committing the felony * * * that we let the payment of those royalties lapse." (R. 1155-1156.)

(3) W. E. Thain, witness for trustee Hart, testified as to royalties which were *delinquent* in May, 1938:

"A. Net, that is right. According to my computation, the delinquency at that date was $1857.66." (R. 1373.)

(4) It appeared on the trial that the commercial smelter to which the lessee shipped the ore and bullion which it mined from the Mount Gaines Mine made eleven remittances of "net returns" to the lessee during the month of February, 1938, aggregating $26,186.28 (see R. 883, seventh column), and during the month of March, 1938, the smelter made five remittances of net returns to lessee aggregating $9373.11. (See R. 883-884, seventh column.) The total of the remittances for these two months are $35,559.39 from which there would be a royalty due of $3555.94. These royalties were in arrears on May 27, 1938 (R. 562-563) and they have never been paid in full; *and they remained unpaid for the greater part until October 22, 1938.* (R. 953-955.)

(5) The check for $1280.53 for the May, 1938, royalty payable on or before May 25, 1938 (R. 561), was inclosed in a letter bearing date May 27, 1938 (and was deposited in the mail, probably in San Diego or La Jolla, California, sometime after July 1, 1938) as the records of Title Ins. & Guaranty Co. show that this check was received by it on July 6, 1938 (R. 954—*eleven days after the May royalty became delinquent.*

In *Skookum Oil Co. v. Thomas,* 162 Cal. 539 at 546, 123 Pac. 363, the Supreme Court of California held that the fact that the vendee "had not the money and at that particular time it was difficult to borrow money" was "an excuse not deemed of any legal significance in a contact of purchase and sale where time was made of the essence of the contract".

(6) The record shows that lessee and *Hart as trustee* for various periods of time operated the Mount Gaines Mine in violation of the Safety Orders of the California Industrial Accident Commission which have the force of law. (Note twenty-one violations cited in the dissenting opinion of Denman, Circuit Judge. (R. 1440-1444.) These violations constituted breaches of the terms of the lease. (R. 39.))

The Circuit Court of Appeals for the Ninth Circuit in its decision in the instant case holds: "All of these alleged violations appear to be relatively minor infractions." (R. 1427.) Not so to the Supreme Court of the State of California which held in *Ethel D. Co. v. Ind. Accident Comm.,* 219 Cal. 699 at 708 (28 P. 2d 919):

> "More important, the duty of petitioner to comply with the Safety Order of the Accident Commission was one that petitoner owed directly to its employees. It is their safety which is at stake when there is noncompliance with the orders of the Commission, the very object and purpose of which is obviously to insure the maximum safety to individuals engaged in the performance of work which presents mutual hazards and dangers.

The Industrial Accident Commission, in its administrative capacity, possesses no authority to waive or consent to the violation of a duty owing primarily and directly to employee from the employer." (Italics ours.)

In the same case the Court said:

"Serious misconduct" of any employer * * * was defined in *E. Clemens Horst Co. v. Ind. Accident Com.*, 184 Cal. 180, 188, 193 Pac. 105, 108, to be "conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees."

And Circuit Judge Denman's dissenting opinion (R. 1434, 1437, 1439, 1440, 1441, 1442, 1443, 1444, 1445, 1446, 1447 and 1448) is in accord with the decision of the California Supreme Court in the *Ethel D. Co. case* above cited.

VIII.

Response, pp. 29-33.

FAITHFUL COMPLIANCE MEANS STRICT COMPLIANCE.

Respondent contends that "faithful compliance" is not defined by petitioners. (Response, pp. 29-33.)

By the terms of the lease the words "faithful compliance" means "*strict compliance*". The lease provides:

"It is mutually understood and agreed by all the parties hereto, that any failure of the owner to insist

upon strict compliance of the terms of this agreement by the Lessees shall not constitute or be deemed a waiver of the right of the Owner to insist upon such compliance." (R. 41.)

In *Caldwell v. Delaray Mines Inc.,* 68 Cal. App. (2d) 180, 156 P. (2d) 52, the question was whether plaintiffs had complied with the terms of an option to purchase a mine. The action was for specific performance. The Court held in respect to the acceptance of the option:

> "The acceptance must in every respect correspond with the offer, neither falling with nor going beyond the terms proposed, but exactly meeting them at all points, and closing with them just as they are stated. (6 Cal. Jur., p. 61; 17c C.J.S. 378; 12 Am. Jur. 535.)"

See quotation from decision in *Waterman v. Banks,* 144 U. S. 294, 36 L. ed. 479, on page 29 of the Petition:

> "* * * Therefore if there is a day fixed for its performance, the lapse of that day without it being performed prevents him from claiming the benefits."

Note: The *Waterman case* arose in California and involved California local law.

IX.

See Response, p. 32.

TIME IS OF THE ESSENCE OF THE CONDITIONS PRECEDENT IN THE LEASE AND OPTION FOR A FURTHER LEASE.

Respondent states on page 32 of his Response:

"The underpayment of royalties mentioned in the instant case were underpayments at that time, or delays in payments. All royalties were paid before the end of the term, except $93.19 to which the rule of deminimus was applied. The failure to strictly comply with the regulations of the Industrial Accident Commission were temporary. So there had been complete performance at the time that the lessor was called upon to perform."

Respondent continues on page 37 of his Response:

"In the instant case any defaults by delays in the payment of royalties was cured by the subsequent payment thereof. Furthermore, all claimed defaults were waived by the lessor continuing to accept royalties after the defaults occurred."

* * * * * * *

"All failures to comply with regulations of the Industrial Accident Commission were corrected long before the expiration of the term."

The decision of the Circuit Court of Appeals in the instant case wholly disregards the provision of the lease that "time is the essence of this contract" (R. 43) and by so doing its decision herein is a decision of an important question of local California law in

conflict with applicable California decisions and statutes, viz.:

(1) In *Champion G. Min. Co. v. Champion Mines,* 164 Cal. 205, 213, 128 Pac. 315, the Court said:

> "* * * it is well settled that an inexcusable failure on the part of the holder of an option to make a payment when the same should be paid according to the agreement, terminates the rights under the option, and makes it impossible for him to enforce the same, in the absence of a waiver on the part of the other party. (See *Oursler v. Thacher,* 152 Cal. 739, 93 Pac. 1007; *Glock v. Howard,* 123 Cal. 1, 55 Pac. 713.)"

In *Mariposa Com. and Min. Co. v. Peters,* 215 Cal. 134 at 142 (8 P. (2d) 849), the Court said:

> "In the first place they were in default in their rental obligations under the lease, and therefore under the terms of the option they had no power to exercise the option of purchase."

To the same effect is

> *Wightman v. Hall,* 62 Cal. App. 632, 217, P. 580.

California Civil Code, Sec. 1495, provides:

> "An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer."

And in *Crowell v. City of Riverside,* 26 Cal. App. (2d) 566 at 579 (80 P. (2d) 126), the Court said:

> "It is settled that where the breach of a condition consists of subletting, no notice requiring

the performance of the covenant need be served since it is impossible for one guilty of the breach not to do that which he has already done. (*Harloe v. Lambie,* 132 Cal. 133, 135, 64 Pac. 88.) The law does not require a vain act."

See petition herein, pages 26-29 and 32.

See also

Skookum Oil Co. v. Thomas, 162 Cal. 539 at 546-547, 123 Pac. 363. This case cited in support of its decision the case of *Waterman v. Banks,* 144 U. S. 394, 36 L. ed. 479, *quoted on page 29 of the petition herein.*

Schwerin Estates Realty Co. v. Slye, 173 Cal. 170 at 172, 159 Pac. 420.

X.

See Response, p. 38.

THERE IS NO WAIVER OF ANY OF THE CONDITIONS PRECEDENT IN THE OPTION FOR A FURTHER LEASE.

Respondent cites the case of *Kern Sunset Oil Co. v. Good Roads Oil Co.,* 214 Cal. 435-440, 6 P. (2d) 71, to the effect that:

"The acceptance of rent by the landlord from the tenant, after the breach of a condition of the lease with full knowledge of all the facts, is waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of said breach." (Resp. 38.)

The rule of law announced in the *Kern Sunset Oil case* has no application to the case at bar for the following reasons:

(1) Lessors never attempted to exercise their right to declare a forfeiture of lessee's rights as lessee under the lease. Petitioners assert that the *option* for a further lease was revoked and was terminated instanter by operation of law, *ipso facto,* the moment there was a breach of any of the conditions precedent in the option, time being of its essence; and that there could not be any waiver of such revocation and termination of the option. The offer in the option was dead. It could not be revived. It could only be renewed by the lessors. The lessee could have made a counter-offer and such counter-offer could have been accepted by the lessors. There is no proof that there was ever any renewal of the offer by the lessors after it was terminated or any acceptance of a counter-offer by the lessors.

(2) There can be no waiver of a termination of an offer which was revoked by operation of law.

> *Bourdieu v. Baker,* 6 Cal. App. (2d) 150 at 161, 44 P. (2d) 587.

San Bernardino I. Co. v. Merrill, 108 Cal. 490, 494, 41 Pac. 487, in which the Court said:

> "The term 'waiver' or to 'waive' implies an abandonment of a right which may be enforced, or a privilege which can be exercised, and there can be no waiver unless at the time of its exercise the right or privilege waived is in existence. There can be no waiver of a right that has been lost."

Williston on Contracts, Rev. Ed., Vol. 6, Sec. 1270, pp. 5530-5551:

> "No liability can arise on a promise subject to a condition precedent until the condition is performed, and if for lapse of time or for any other reason the condition cannot be performed no liability can ever arise upon the promise. In other words, it will be discharged."

What is commonly called a "waiver" of a breach of a condition precedent in an option is where the offeree makes a counter-offer after the original offer has expired, and the original offerer accepts such counter-offer. (*Williston on Contracts,* Rev. Ed., Vol. 1, Sec. 92, p. 291.)

(3) The covenants and obligations of the lessee in the *lease* were not covenants or obligations of the lessee under the *option* for a further lease. The lessee had no duty or obligation to perform under the *option* for a further lease unless and until he had accepted the offer therein in accordance with its terms. The proof is uncontradicted to the effect that both the lessee and trustee *breached the conditions precedent in the option* and that at the time the trustee requested a renewal of the lease *it was impossible for him to comply with the conditions precedent in the option.* He could not undo the breaches *of the lease* which *were conditions precedent in the option* (*Harloe v. Lambie,* 132 Cal. 133, 135, 64 Pac. 88) time being of the essence.

See

Swift v. Occidental Mining Co., 141 Cal. 161, at 173, 74 Pac. 700 at 704, and Petition, pp. 28-29.

(4) The record shows that James P. Hart was appointed trustee herein on August 11, 1939 (R. 25) and that the most flagrant violations of the Mine Safety Orders of the California Industrial Accident Commission at the Mount Gaines mine occurred under the mine management of the said James P. Hart as trustee during the years 1940, 1941, 1942 and 1943. (R. 653-655; 660-662; 663-668; 669-674 and 682.)

There is nothing in the record to show that the lessors or any of them ever knew or suspected that there were any violations of said orders during 1940, 1941, 1942 or 1943. (See dissenting opinion. (R. 1447.))

Therefore, under no theory recognized by California local law, can it be held that the lessors as offerers under said option for a further lease ever "waived" the breaches of the conditions precedent in the said option resulting from the violation by trustee Hart of the Safety Orders of the California Industrial Accident Commission during 1940-1943 of which they had no knowledge.

In *Taylor v. Budd,* 217 Cal. 262, 18 P. (2d) 333, the Court said:

> "Waiver is an intentional relinquishment of a known right."

XI.

See Response, p. 39.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT IN ANY EVENT THE COURT HAD THE POWER TO RELIEVE THE LESSEE AND TRUSTEE FROM A LOSS IN THE NATURE OF A FORFEITURE UNDER CALIFORNIA CIVIL CODE SECTION 3275 IS CONTRARY TO CALIFORNIA LOCAL LAW.

Respondent on page 39 states:

> "The reference to Section 3275 C. C. California not in conflict with local law."

The decision of the Circuit Court of Appeals in the instant case that the Court had the power to relieve Hart as trustee, under the provisions of Calif. Civ. Code, Section 3275, from "a forfeiture or a *loss in the nature of a forfeiture*", by reason of his failure to comply with the conditions precedent in the option for a further lease, is in direct violation of California local law as announced in the following California cases:

Parsons v. Smilie, 97 Cal. 647, at 652-656, 32 Pac. 702;

Crowell v. City of Riverside, 26 Cal. App. (2d) 566, 581, 80 P. (2d) 120;

Shaw v. Guaranty Liquidation Corp., 67 Cal. App. (2d) 660, 155 P. (2d) 53;

Leslie v. Federal Finance Co., 14 Cal. (2d) 73, 80, 92 P. (2d) 906.

In *Parsons v. Smilie* at page 654 the Court, referring to California Civil Code, Section 3275, said:

"Compensation will only be made where there is some measure or standard by which it can be estimated; * * *"

Definition of "wilful".

In *Crowell v. City of Riverside,* 26 Cal. App. (2d) 566, at 581 (80 P. (2d) 120), the Court said:

"Wilful" as the word is used in this code section (Cal. Civ. Code Sec. 3275), is to be understood in its ordinary sense of "spontaneous" or "voluntary". Under this definition all of the admitted breaches of the terms and provisions of the lease by lessee (and by Hart as trustee) were "wilful" and therefore not subject to relief under said code section. (See also Petition, pp. 31-32.)

From the foregoing decisions rendered by the Courts of California as to what constitutes "wilful" as applied to the numerous breaches by the lessee and by the trustee of the terms and covenants in the lease involved in this action, it follows that the decision of the Circuit Court of Appeals for the Ninth Circuit in the instant case to the effect that: "* * * that there was no grossly negligent, wilful * * * breach of duty" (R. 1432-1433) by the lessee or trustee, is a decision of an important question of local California law in conflict with applicable California decisions in that said decision holds that the admitted violations and breaches of the terms and covenants of the lease were not *"wilful"* breaches of duty.

We call this Court's special attention to the dissenting opinion of Denman, Circuit Judge, in which he

clearly points out that the decision of the Circuit Court of Appeals in the instant case is *a decision of an important question of California local law in conflict with Crowell v. The City of Riverside,* 26 Cal. App. (2d) 556, 581, 80 P. (2d) 120, and *Leslie v. Federal Finance Company,* 14 Cal. (2d) 73, 80, 92 P. 2d 906. (R. 1434-1449.)

(See Petition, pp. 29-32.)

XII.

See Response, p. 41.

OPTION IN A LEASE FOR A FURTHER LEASE DOES NOT VEST AN INTEREST OR ESTATE IN THE LEASED PREMISES.

On page 41 respondent states:

> "The Supreme Court of California has definitely decided that an agreement contained in a lease for an extension or renewal *does vest an estate or interest in the property in the lessee.*"

The later decisions of the Supreme Court of California are to the effect that an option in a lease does not create or constitute any title or interest in the leased premises. In *Ware v. Quigley* (1917) 176 Cal. 694 at 698, 169 Pac. 377, the Court said:

> "An option is not a transfer of property. No title is conveyed thereby. It is a mere right of election acquired by one under a contract to accept or reject a present offer within the time therein fixed. (Am. & Eng. Ency. of Law, p. 924.)"

To the same effect see:

Hicks v. Christeson, 174 Cal. (1917) 712-716, 164 Pac. 393;

Johnson v. Clark (1917) 174 Cal. 582 at 584, 163 Pac. 1004;

Daugherty v. California Kettleman etc. (1937) 9 Cal. (2d) 58 at 78, 69 P. 2d 155.

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